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# **LEGAL ASSISTANCE IN SCOTLAND**

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

### **CONSULTATION RESPONSES**



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Additional Responses -

Some respondents have asked for their comments to remain confidential. These responses have not been included in this report.

## AIRDRIE FACULTY OF SOLICITORS

### AIRDRIE FACULTY OF SOLICITORS, CIVIL RESPONSE

#### Introduction

Following the recent publication of the discussion paper on the Future of Legal Aid, extensive consideration has been given to its contents by the civil practitioners of The Airdrie Faculty of Solicitors.

There are a number of issues raised by the discussion paper where the considered view of our faculty is that the Law Society's proposals are entirely out of line with what we consider would best promote the principle of equal access to justice for all. Much of the discussion paper also appears to us to be entirely contradictory to the best interests of the profession as a whole.

We have split our response into 3 main sections. The first sets out what we see as the fundamental error in the approach being taken by the society and sets out an alternative, the second deals with the cuts to Civil legal aid proposed in the discussion paper and the third deals with the procedural reform proposed for the administration of civil legal aid.

#### 1. Alternative To Accepting Cuts

The starting off point for the Law Society must surely be that the Legal Aid budget has already been cut too deep and that further cuts must be opposed entirely. Our understanding is that spending per head of population on legal aid in Scotland is only £29 as compared with £55 in England and Wales. This strongly supports the position that the legal aid budget in Scotland was already underfunded compared to the rest of the UK, even prior to any cuts being made. To concede the fact that cuts are needed to the legal fees aspect of the legal aid budget at all is a mistake. We should instead be pointing to the fact that services have already been cut and that the "level playing field" in terms of access to justice that is supposedly sought has already been eroded and will be eroded further by additional cuts.

In our view, the Law Society should have made a stand to protect access to justice and to protect its members by opposing cuts some time ago. The lack of inflationary rises to fees, and the additional administrative burden placed on solicitors over the years, has meant that we effectively had austerity imposed upon us 15 years before the rest of the country! The figures of spending per head of population demonstrate that the Scottish Government is already getting a lot of "bang for its buck" from the legal aid budget. To target further cuts places at risk the principles upon which legal aid is supposed to operate and it also places at risk many jobs in legal firms throughout the country.

Proposals by the Law Society to cut the scope of legal aid in various ways does not allow us to dictate the narrative. This was evidenced by the last round of cuts when the cuts proposed by the Law Society were effectively adopted in addition to the cuts originally proposed by the legal aid board. By continually agreeing to the principle that savings must be made we



are giving an open door to whichever administration is in power to continue with the cost cutting exercise. In a recent visit to meet with the solicitors of the Airdrie Faculty, the President of the Law Society suggested that there was a choice: either we accept that cuts were coming and that we do what we can to try to dictate the narrative on that; or, we say that the government is lying about the funds available in the legal aid pot.

It is our view that this had completely missed the third and most important option available to us which is to seek to exert political pressure upon the Scottish government to ensure that additional funding can be found to properly fund the legal aid system Scotland. It is understood that there may very well be budget constraints placed on legal aid. However, those constraints are determined by the political priorities of the ruling administration. They are hardly likely to give spending on legal aid greater priority in circumstances where there is no political pressure to do so.

Surely we should be at the point of trying increase public awareness of the fact that the cuts have already had a significant impact on access to justice in Scotland. For example, it is now almost impossible to get legal aid to raise proceedings to get protective orders for victims of domestic abuse. Equally, it is now very difficult, if not impossible, to be able to raise urgent court proceedings on behalf of a parent who has had his contact unilaterally brought to an end, even if the opponent has made it clear he or she is unwilling to re-consider his or her position. There are a range of other ways that the cuts have impacted on access to justice, many of which would attract public sympathy if they were more widely known about.

It would seem obvious to us that the best way to persuade any government to increase (or at least not reduce) spending on legal aid is to gain public support for that point of view. We would have thought that the Law Society should be devoting considerable effort and resources to co-ordinating a campaign of that nature.

We would have thought that there are various groups and organisations who may be in a position to support such a campaign:

- Women's Aid
- Victim Support
- Trade Unions
- Social Welfare and Poverty Support Groups
- Parent Groups such as Families Need
- Fathers, etc.

If representations were to be made by these groups, not only opposing the principle of further cuts, but also highlighting the impact cuts to date have made, then we would have thought that it would become politically more unpalatable to proceed with any cuts. This is particularly the case given the statistics emerging in England and Wales regarding problems caused by the legal aid cuts made there, including the greater numbers of party litigants and greater pressure on the courts as a consequence. We would therefore have thought that it

should be an immediate priority to seek to lobby these organisations for support with a view to having them publicly oppose any further cuts to the legal aid budget.

Furthermore, solicitors, staff in legal offices and clients themselves all have individual voices in the political system. If the Law Society encouraged solicitors to contact their MSPs, and to ask their clients to do likewise, to raise concerns, then this could also assist in putting the issue of legal aid funding onto the radar of many at Holyrood.

If traction could be gained to the point where it was felt by politicians that legal aid cuts may cost votes, then it may be that the political will to make such cuts would weaken. Given the imminence of the next General Election, and the particular post-referendum political sensibilities which exist at present, we would have thought that a high profile campaign to support legal aid which is based on the principles of equality and access to justice would be something that both SNP and Labour would find difficult to ignore. Our understanding is that there are good prospects of media outlets being receptive to a campaign of the type described and that the SNP are particularly sensitive to negative publicity at present, particularly around issues concerning equality in society which is a key issue for them politically at present. Furthermore, it is our view that steps should be taken immediately in this regard since the incoming Justice Minister comes from a social welfare background and may well be more receptive to such advances than his predecessor.

## 2. Proposals To Limit The Scope Of Legal Aid

### a) The Proposals Outlined in the Discussion Paper

Having said all of that, if it was to be felt that, in discussion with the Legal Aid Board or as part of the campaign referred to above, there was still a need to make a recommendation to propose some sort of cuts to the fees element of the legal aid budget, then the cuts on the civil side should surely not be made by cutting areas from legal aid entirely. In our view, the proposals made to cut legal aid from the areas identified in the discussion paper enters into dangerous territory by opening up discussions as to whole areas of law to be excluded from legal aid. Once the areas in question have been removed, who is to say the next step would not be to remove contact actions or other types of proceedings from the scope of legal aid?

It does also seem to us that the areas identified for removing from the scope of legal aid have not been properly thought out. Part of the rationale for selecting areas such as debt and housing as being appropriate to remove from legal aid is that advice can be provided by other agencies such as Citizens advice or Advice Centres. There is surely a question as to how these organisations, whose resources are already stretched, would be able meet the additional burden such a proposal would place on them. Presumably they would require additional state funding. Consequently, it does not seem to us that there would be a genuine saving at all. Rather, similar sums would be required from the public purse, the only difference being that it would be paid to unqualified advisors rather than to solicitors as part of the legal aid pot. We have to say that it was with dismay that we read the Law Society's discussion paper which effectively makes a recommendation to take public funding away from work currently carried out by solicitors only for that funding to be used to have that work carried out by non-solicitors.

Surely, legal aid, like most forms of state welfare, is to provide a safety net for those most in need. It would seem strange to suggest that those who are in serious debt, or who are being faced with eviction from their home, should be denied use of that safety net.

In relation to the notion of removing financial only divorces from the scope of legal aid, then this misses the point that in many financial only divorces the applicant would not be in a position to make payment of fees even after the recovery is made. For example, if an applicant's claim is in relation to a pension share, then at present a hardship application could be completed to avoid recovery from the client. Likewise, if a client simply does not respond to requests for payment then the legal aid board can seek to make a recovery directly from the client. Also, in cases where the Defender may have dissipated assets then again, it may be difficult to make a recovery on behalf of the client through no fault of the client and so again legal aid funding becomes of great importance. Removal of legal aid from such cases also fails to take into account the question of who meets the costs of outlays in the progress of such case. Given the lack of funds available to the client presumably the burden would fall on the solicitor to meet the costs of outlays at their own risk. If legal aid was not available then no court fee exemption would be available and so there would be significant outlays in every case from the outset, quite apart from those cases where actuarial reports, etc, may be required. This seems to us to be entirely unreasonable. It seems to us that, in financial only divorces, there will also be a fairly significant recovery in successful cases in any event. In those cases where no recovery is made, then the applicant will have required legal aid and should have the benefit of it. Consequently, removal of legal aid in such cases would cause significant hardship to applicants in some cases or would impact upon access to justice for many people.

In relation to reparation actions, it is entirely inappropriate for legal aid to be removed from the scope of legal aid to force people to enter into speculative fee agreements. Such agreements are appropriate for private clients since it means that the client who can afford to pay agrees to substitute paying fees in advance in exchange for giving up a portion of their damages if successful. This is agreed by them as an ALTERNATIVE to paying privately in the usual way. It is only appropriate in cases where the person pursuing the claim is in a financial position to be able to meet their own legal costs. To remove such actions from the scope of legal aid forces the poorest in our society to give up a portion of their damages. Those damages are agreed at a level to compensate the individual and if they have limited financial means then they will be reliant upon their full award of damages being received. In cases where their claim is successful under legal aid there is very rarely a deduction from damages since the other side generally pay legal expenses in addition to the principal sum. Consequently, removal of reparation actions from the scope of legal aid would mean that the poorest people would be forced into entering agreements with firms who are likely to charge a significant portion of damages in exchange for legal services, irrespective of the financial problems that may cause for someone in receipt of a low income.

b) Alternative Proposals

i) Reduce Financial Eligibility Limit



A preferable option to reduce costs would surely be to reduce the financial eligibility limit. This would cut the numbers of people eligible for legal aid but would not weaken the principle of legal aid providing a safety net for those most in need.

At present those with a Disposable income of over £25000 qualify for civil legal aid. The figure for disposable income is taken after deduction of tax and NI, but it is also net of mortgage, rent, council tax, childcare costs and various other items of expenditure. There are also deductions where an applicant has children or a spouse. Consequently, the present system means that around 75% of the population qualify for civil legal aid. As it stands, an applicant with a spouse and 2 kids who has a mortgage and who has typical outgoings such as travel to and from work, council tax, utility bills, etc, will still qualify so long as his top line earnings are less than £70000. Applicants with earnings well above that may also qualify depending on their outgoings. Surely, a stretched legal aid budget should not be used to provide cover to those who are in a position to meet their legal costs privately!

A reduction to the eligibility threshold to say £15000 would still mean a very large proportion of people would qualify for legal aid. Anyone who did not qualify would have net disposable income of £15000 and so would be in a position to privately fund legal costs. This would also take a large number of cases away from legal aid and would mean a significant saving to the fund. It would also have a comparatively small impact upon access to justice. I cannot see any other proposal to reduce costs that would have such a small impact on access to justice. Our understanding is that a change of this nature would lead to a saving of around £1.3M to the legal aid fund.

#### ii) Financial Assessment for Guardianship Applications

The second potential saving from the legal aid budget that could potentially be made with minimal impact on access to justice would be to introduce a means benefit test to Guardianship Applications. In cases where the adult has significant assets from which to meet the costs of a guardianship application, there does not seem to be a clear rationale as to why that cost should be borne by the public purse. We understand that this would lead to a further saving of approximately £800,000.

Consequently, these 2 changes could lead to a saving from the civil legal aid budget of around £2.1million. This amounts to a saving of around 4.4% of the current spending in civil cases. When combined with the other cost saving measures recently introduced, which are not yet properly reflected in the current expenditure figures, we would have thought that this will deliver very significant savings to civil legal aid expenditure.

### 3. Administrative Reforms

#### a) The Proposals Outlined in the Discussion Paper

With regard to the proposals for administrative reform of the legal aid application process in civil cases, we would cautiously recommend this proposal. We can certainly see the sense of having a single grant of legal aid if it were to be operated in such a way as to streamline the administration involved. However, the concern would be that the legal aid board may seek to operate such a system in the exact opposite way. For example, they may ask for additional



information at every stage of the process and effectively dictate how a solicitor deals with a file by suspending or threatening to suspend legal aid on a regular basis unless matters are dealt with in the way they dictate. There would also be a concern that a single grant of Legal Aid may take time to be approved whereas in many cases it is important that legal aid is approved immediately, as is the case with advice and assistance.

b) Additional Proposal

It also seems to us that there may also be a further potential saving to be made in administering legal by reducing, or removing entirely, the Peer Review System. It seems to us that this system contributes little, if anything, either to the quality of legal assistance provided or to the economic handling of files. It seems to us that the Peer Review System has demonstrated that legal aid solicitors provide a high level of service to their clients. The cost spent on this system would seem to be disproportionate to any perceived benefit it may bring and therefore scaling back the review system would seem to us to be an obvious way to cut costs without impacting on access to justice or quality of service provided in any way.



AIRDRIE FACULTY OF SOLICITORS, MEETING REPORT

	<b>Raised by Alistair</b>	<b>Raised by audience</b>	<b>Notes/level of engagement</b>
Legal aid	X	X	<p>Discussion around LSS legal aid reform paper:</p> <ul style="list-style-type: none"><li>• President outlining future challenge to public expenditure, need for innovation and more constructive and proactive relationship with government</li><li>• Concern that LSS 'accepting' further cuts to budget</li><li>• Belief that cuts would not be necessary if LSS had done more to encourage positive image for lawyers overall and legal aid in particular</li><li>• If legal aid practitioners only 10% of profession, consideration requested around differential PC rates</li><li>• Lack of confidence in current LSS ability to shape public opinion and recommendation that PR organisation hired to raise profile</li><li>• Positive feedback following meeting on LSS collaborative approach on legal aid issues, involving others in justice sector</li><li>• Mixed views on civil legal aid proposals, with the faculty setting up a committee to consider and complete a response to LSS</li><li>• The proactive approach of the LSS paper was noted, though ensuring that civil and criminal practitioners remained united would be crucial</li></ul>



## ALAN HUTCHESON

### FIRST RESPONSE

The profession needs to instruct someone, for example Dr John Pollock (who conducts the cost of time survey), to produce statistical information showing the fee income we require to generate per hour to make our practices sustainable. Current block fees do not sufficiently cover the categories and volume of work required.

Interminable wrangling over accounts further erodes margins, and the Board must be obliged to publish all taxation results, favourable and unfavourable, in order to bring certainty and avoid wasting everyone's time, including that of the Board.

It is for the Government to decide how much money it wishes to spend on legal aid, and indeed if it wishes to employ its own provider. It is for the profession to indicate the charges it requires to impose, and as its bargaining position may not currently be strong (certainly in civil matters), it needs strong statistical evidence to support its position.

Virtually everyone in East Kilbride has given up civil legal aid work because the low fees and business disruption render it uneconomic.

### SECOND RESPONSE

We do not intervene in the now onerous administrative process of collating and organising numerous financial documents, vouching an applicant's financial eligibility for legal aid, although we do transmit the documents to the Board. Such collation, and organisation is not a legal service. It is for this reason that the Board is unwilling to fund that service in any context, and eroding profit margins no longer allow us to provide it. It would be helpful accordingly if the Board removed the invitation on its forms that the applicant should contact their solicitor for assistance in this non legal exercise. Obviously, if margins are restored to a reasonable basis, this and numerous other areas of gratuitous assistance to the process may be restored, however regrettably no such gratuitous non legal service is currently available.

## ASSOCIATION OF PERSONAL INJURY LAWYERS

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25year history of working to help injured people gain access to justice they need and deserve. We have around 3,800 members across the UK and abroad, committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

### **Introduction**

Though no longer extensively used in personal injury cases at the litigation stage, legal aid remains for some claimants an essential public service, and should be retained. Legal aid helps to ensure access to justice by providing an equality of arms between the pursuer and defender, and it also represents good value for money. The Scottish Government acknowledges that eighty five per cent of legally aided personal injury cases are successful<sup>1</sup>, and when the case is successful, the defender must pay the other side's costs, resulting in no claim on the legal aid fund.

Whilst we are willing to provide our comments on the proposals outlined in the discussion document, we are conscious that the consultation, despite labelled as a Law Society of Scotland discussion paper, has been put together by the Legal Aid Committee of the Law Society – and the proposals therefore do not, at this stage, have the support of the Law Society as a whole.

APIL is committed to supporting improvements of the legal aid system in Scotland, and has an on-going dialogue with the Scottish Legal Aid Board (SLAB) to this end. Within the last two years, APIL has worked with SLAB on the introduction of the template increase scheme, a protocol for sanction for expert witnesses, and amendments to the legal aid handbook. We

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<sup>1</sup> Courts Reform (Scotland) Bill, Financial Memorandum, Paragraph 95

agree with the approach outlined in SLAB's 2013/2014 annual report, that there is scope for simplifying and reforming aspects of legal aid – but reforms must be done in the context of wider reforms of the justice system, and should not jeopardise access to justice for those that need it.

### **Lack of statistical evidence**

The proposals within the discussion paper are being put forward without any evidence of an impact assessment on the potentially affected parties. According to SLAB's annual report, there were 3837 grants of advice and assistance for personal injury claims in 2012/2013<sup>2</sup>. If the proposals within the discussion document were to go ahead, and advice and assistance was removed for personal injury claims, these 3837 people would be denied access to justice.

Further, there is no attempt within the consultation document to indicate the nature of any savings to be made by exclusion of personal injury from the legal aid scheme. We do have to comment that this is a serious omission in a report which purports to re-arrange the legal aid budget. It is well known that civil legal aid for personal injury work is more or less self-financing, with an 85 per cent recovery rate from successful cases where judicial expenses have been recovered. In this 85 per cent of cases, no claim is made by the pursuer on the legal aid fund, as the defender pays the costs, and the providers of medical treatment can recoup their costs, too. Not only is legal aid in personal injury claims excellent value for money for the public, it is doubtful if its exclusion will lead to much in the way of savings.

### **Advice and Assistance**

Many of our members use the Advice and Assistance scheme for preliminary investigations of cases which would otherwise not be taken on. In many types of industrial disease case, involving for example deafness, vibration white finger or industrial asthma, a significant amount of preliminary work and initial medical investigation must be carried out, before the claim can begin. The costs involved in this initial investigation are beyond the means of the legally aided applicant, and these cases are unlikely to be taken on a speculative basis by the profession. The vague assurance within the consultation document that the advice network could accommodate these cases betrays a level of ignorance about the realities of this kind of work. There is neither the appetite nor the expertise within the advice sector to deal with these cases. Without the advice and assistance framework in place, those who require legal aid will likely be denied access to justice.

As above – there is no evidence put forward in the consultation document that there is a financial need to remove the provision of advice and assistance for personal injury claims. The number of applications for advice and assistance has actually been falling over the past

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<sup>2</sup> [http://www.slab.org.uk/common/documents/Annual\\_Report\\_2012\\_13/Appendix\\_3\\_-\\_Civil\\_legal\\_assistance.pdf](http://www.slab.org.uk/common/documents/Annual_Report_2012_13/Appendix_3_-_Civil_legal_assistance.pdf)

few years. Between 2011/2012 and 2012/2013, the number of applications for advice and assistance for personal injury claims fell by 7 per cent<sup>3</sup>.

### **Courts Reform (Scotland) Act 2014**

Changes brought about by the Courts Reform (Scotland) Act 2014 are also predicted to save money for the Legal Aid Fund in the future. As a result of the Act, cases which were previously heard in the Court of Session will now be heard in the Sheriff Court, and the Government and the Board have provided various estimates of savings between £500,000 and £1.2m. While the provenance of these figures is uncertain, a combination of these savings, together with personal injury cases already being good value for money; and a continuing downward trend in the number of applications for civil legal assistance – it is clear that there is little to no financial justification for removing personal injury from the scope of legal aid.

### **Efficiency/streamlining**

#### ***Single continuing grant and single test of financial eligibility***

No one can be opposed to these ideas in principle. In practice, the current system whereby cases initially proceed under Advice and Assistance on a template increase works reasonably well. Practitioners are fully aware of the evidential requirements for a civil legal aid application. The Scottish Legal Aid Board handbook provides detailed and extensive guidance on this. Stage reporting requirements now ensure on-going scrutiny of legal aid cases. It is difficult to see in practical terms what real benefits the “harmonisation” proposed by the legal aid committee would provide.

### **Scope of civil legal assistance**

#### ***Removing personal injury claims from the scope of civil legal assistance***

We do not believe that personal injury claims should be removed from the scope of civil legal assistance. Legal aid provides access to justice to those who have insufficient resources to be able to obtain legal representation. In personal injury claims, legal aid ensures a level playing field between the pursuer – who will most likely be a one-time user of the system – and the well-resourced defender insurance company. There must be equality of arms between the parties to ensure a fair hearing, and those who cannot afford to fund a legal representative themselves should not be disadvantaged.

Access to a legal representative is vital to providing access to justice for all. Legal aid is one way to ensure that those with low means are able to access help and advice to obtain the remuneration they deserve, and to be put back, as closely as possible, to the position that they were in before the accident.

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<sup>3</sup> SLAB annual report 2012/13

[http://www.slab.org.uk/common/documents/Annual\\_Report\\_2012\\_13/Appendix\\_3\\_-\\_Civil\\_legal\\_assistance.pdf](http://www.slab.org.uk/common/documents/Annual_Report_2012_13/Appendix_3_-_Civil_legal_assistance.pdf)

BRIAN TAIT

Dear Mark and Ian,

I apologise for having missed your deadline but hope that this submission may still be considered by you.

Thank you for your personal efforts and the efforts of your Committee in preparing the discussion paper on Legal Assistance in Scotland. Clearly a considerable amount of thought has gone into the paper.

The open forum meeting gave the profession a useful opportunity to debate the discussion paper although it was disappointing that so few solicitors in private practice chose to attend. For something which may have a major implication for high street practice I had expected a greater level of interest. The fact that the majority of those represented appeared to come from law centres, who may have felt a greater impact from the proposals contained in the discussion paper, leads me to believe that for those who read the paper an attitude may have been gained that "if it's not going to affect me there is no need for me to have my say." I do hope that you have had greater success in written feedback. It would be a shame if the final proposals are led by only a few views but then complained about by many more!

Insofar as the proposed reform of Criminal Legal Assistance personally I do very little criminal legal assistance. The only view that I would express is that at present it seems to be an extremely complicated system between Advice & Assistance, ABWOR and Criminal Legal Aid. A simplification of the system would certainly be welcome.

Insofar as Civil Legal Assistance is concerned, with the exception of Children's Legal Assistance/Legal Aid, which seems to be overly complex and involves numerous applications over different stages of the process, I have not ever found Civil Legal Assistance to be particularly difficult to deal with. In my view the grant of Advice and Assistance to cover work done pre-litigation and Civil Legal Aid to cover litigation is not a particularly difficult concept. Indeed the need to make a Legal Aid application should be a point in time to give the solicitor the opportunity to review why a case is not capable of resolution extra-judicially.. If the matter is to be litigated, it gives the opportunity to review what is to be litigated, what the prospects of success are and what evidence will need to be obtained. Properly thought out Legal Aid applications, in my view, give a time to reflect on where the action is going.



Whilst I am sure that there is an opportunity for simplification, civil cases can run for considerably longer than criminal cases during which time there may be changes in circumstance and it may be more difficult to replicate in civil cases the proposed changes to criminal cases. If all that is going to happen is that a greater degree of stage reporting is introduced throughout what would have been the Advice and Assistance stage and the approval for litigation becomes a reassessment of financial eligibility and a more extensive stage report to justify the sanction of litigation there may in fact be less achieved than was intended. However, having had a civil legal aid practice throughout my career if the Committee can indeed come up with a simplification of the process which would lead to less "form filling" for the solicitor that would be welcome progress.

Insofar as financial eligibility for Advice and Assistance and Legal Aid is concerned it always astonishes me the difference between the upper limit for financial eligibility for Advice and Assistance and the upper limit for financial eligibility for full Legal Aid. A person on modest means may well be ineligible for Advice and Assistance but financially eligible for full Legal Aid with a modest contribution. The level of contribution paid in Advice and Assistance cases is extremely modest and bears little relation to the amount of work done over the course of the case. Indeed, even the highest contribution could be used up following one lengthy meeting and correspondence following thereon. If there were a simplification of the Civil Legal Assistance scheme whereby Civil Legal Assistance was assessed at the outset and the grant continued throughout the course of the case, subject to periodic reviews and approvals by the Scottish Legal Aid Board, then one option would be that when a person is admitted to Civil Legal Assistance a more realistic contribution is sought based on that person's means which would be paid over the life of the case by monthly contributions. Whilst at the outset of the case it cannot always be predicted what route the case will take and what matters need to be pursued with a system of stage reporting and financial reassessments the applicant could have their contribution reassessed over the life of the case and the level of contribution changed dependent upon their personal circumstances and what action is being taken on their behalf e.g. whether the matter is progressing through negotiations or whether the matter is proceeding to litigation. If the upper financial eligibility limit for civil cases is reduced that, in my view, would indeed ensure that expenditure could be targeted in areas that need it most whilst those who are financially eligible can look at other avenues for pursuit of their legal rights.

The areas that seemed to raise most concern at the open forum meeting was the idea that certain areas of law be removed from the scope of Civil Legal Assistance. Whilst I would support the introduction of means testing for Adults with Incapacity applications I am opposed to the removal altogether of certain areas of law from Civil Legal Assistance. Civil Legal Assistance is being provided to an individual who requires to be legally represented. It is the individual circumstances of the person requiring representation that determines whether Legal Aid is granted. I do not think it is for us as a profession to make decisions for members of the public as to whether they might have a right to Legal Aid in future for their



particular legal problem. At the open forum meeting I had suggested that a better managed and consistent merits test being applied by the Scottish Legal Aid Board would be more appropriate. In each of the areas of law listed on page 40 of the discussion paper which are proposed to be removed from the scope of civil legal assistance I can think of more than one example where I have personal experience of clients who would not have achieved a legal remedy but for the availability of Legal Aid. I list the following examples:-

1. Financial Only Divorce – what is to happen to the lady who has not worked throughout the course of a lengthy marriage; has no income in her own right; has no capital in her name; and whose unco-operative husband who operates businesses and is believed to have investments will not provide any information following the couples' separation? The lady has no means to pay privately for her legal fees. The solicitor has no idea what assets the husband has, where those assets are and how much they might ultimately be worth so would be a fool to propose that he will be paid at the end of the case. The lady is unable to borrow any money to pay for the legal fees because she has no means to pay the loan and any funding system which relies upon the success of the case cannot be satisfied because there is insufficient information to put before the provider as to what the ultimate outcome will be. The lady is left without a remedy if she cannot apply for Legal Aid to raise court proceedings to order production of the valuations and the like. Ultimately if she succeeds her legal fees will be met either through an award of judicial expenses or through recoupment.
2. What is the person who is unfairly dismissed to do when they are unable to secure the services of a solicitor under Legal Aid, cannot afford to pay a solicitor and is facing a Tribunal hearing against a legally represented employer. The Government has already made it difficult enough for that individual to pursue their rights through the introduction of fees and in ACAS early conciliation. That person is left at an unfair disadvantage of either having to represent themselves or enter into an arrangement with a non regulated "legal advisor" who may take a percentage of their award. They are unlikely to get a "no win no fee" solicitor to take on the case in the absence of there being any likelihood of an award of expenses or any guarantee of success. The solicitor cannot compete on a level playing field with the "legal advisor". At the open forum meeting the advice agencies were quite clear that they could not take on the huge influx of cases that there would be if legal Advice and Assistance were removed.

The academic present at the open forum meeting discouraged the profession from volunteering to remove areas of law from the scope of Civil Legal Assistance. I agree with that view. One of the problems with assessments currently being carried out by the Scottish Legal Aid Board is that there seems no rhyme nor reason why one application might be granted and another is not. Even when you lodge objections to a Legal Aid application rarely does it seem to make any difference to the grant. I can think of one recent example



where I lodged an objection to a Legal Aid application by a father seeking contact with his children on the basis that a reasonable offer of contact had in fact been made and the mother was also willing to attend mediation. The difference between what the father wanted and what the mother was offering was that he wanted the children three weekends out of four and the mother was offering two weekends. On the basis that the mother worked alternate weekends depending on when her work fell she might lose out on having weekend time with her children. The offer seemed reasonable but the Scottish Legal Aid Board still granted Legal Aid to the father to raise proceedings. He duly did so and a Legal Aid application was submitted on behalf of the mother to defend the proceedings. Astonishingly the Scottish Legal Aid Board then refused her Legal Aid application on the basis that the difference between the parties seemed to be so little that litigation was not justified. When I pointed out to the Board that I had raised an objection to the father's Legal Aid application and it would now seem astonishing for them to refuse Legal Aid to the mother lo and behold the review application was then granted. Needless to say the father was only awarded alternate weekends, after a while lost interest in the court proceedings, his Legal Aid was suspended and terminated and the action dismissed with an award of expenses against him. Both parties were legal aided. It cost the public purse a considerable amount and could have avoided.

The profession would indeed need to be educated on what will and will not normally merit the grant of Legal Aid and the Scottish Legal Aid Board staff will have to be consistent in their decision making. Factors that the merits application may take into account would include the availability of other funding. Therefore the lady who has the financial only divorce who could indeed get funding elsewhere may have to justify why it would not be reasonable for her to seek an alternative source of funding. Where the Scottish Legal Aid Board is going to expect parties to use other sources of funding the Scottish Legal Aid Board must engage with potential providers to ensure that the majority of applications would have funding made available to them. Alternatively the Scottish Legal Aid Board could provide loans through an agency similar to the Student Awards Association.

The Committee should not be discouraged from seeking reform. I suspect that this is a major exercise which involves more than just the Scottish Legal Aid Board. If alternative sources of funding are to be looked at there has to be some degree of certainty that those alternative sources will be available to the majority and will be affordable.

Yours sincerely

Brian J Tait SSC

Partner

For and on behalf of Drummond Miller LLP

Solicitors & Estate Agents

## CITIZENS ADVICE SCOTLAND

Lauren Wood, January 2015

### Introduction

Citizens Advice Scotland (CAS) and the associated network of Citizens Advice Bureaux (CAB) form Scotland's largest independent advice and advocacy network. CAS is the umbrella organisation for Scotland's network of 82 CAB offices. These bureaux deliver frontline advice services throughout over 200 service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities.

Almost every issue which comes through the doors of a bureau has the potential to interact with the legal system. A debt issue, for example, can quickly become an access to justice issue if rent is not paid:

**A North of Scotland CAB reports of a client who sought help for six payday loans. The client has been struggling to make repayments for a couple of months. She started with one loan of £150, then took another to meet the repayments of the first and the situation snowballed out of control. She now owes over £5000. The client has been prioritising the payments to the Payday Loan companies and has not been keeping up with her rent payments. She is now in rent arrears and her landlord is threatening eviction if the rent arrears are not addressed.**

In 2013/2014, Citizens Advice Bureaux in Scotland advised clients on almost 560,000 new issues. This included 119,492 debt issues, 46,000 employment issues, and 40,000 housing issues. While many of these issues were resolved at a stage earlier than the need for legal intervention, over 22,000 issues were recorded as 'legal' and there were 5,591 activities recorded involving representation. CAS only speaks for civil matters and so will not comment on the specifics of the criminal legal aid section of the paper.

### Key Points

CAS does not agree with the proposals outlined in the Discussion Paper for reform to civil legal aid. We have grave concerns about the impact the proposals would have on the citizens of Scotland who rely on civil legal aid to pursue and defend their civil rights. While we agree there is scope to simplify the legal aid landscape in Scotland, we believe that the proposals put forth in this discussion paper would be fundamentally detrimental to clients. In particular:

- Citizens Advice Scotland has serious concerns about the assertion that advice agencies could "easily and properly" pick up the workload from the topics which the paper suggests removing from the scope of civil legal aid. This suggestion shows little understanding of the pressures advice services face both in demand and funding
- The paper does not acknowledge that often those with a need for criminal legal aid will also have a need for civil legal aid



- The paper has no regard to the wider context of civil justice reform and the impact this will have on the legal aid budget
- The proposals have no regard to the fact that there are some cases where a solicitor is required
- The paper is overwhelmingly biased towards criminal legal aid practitioners

### **The paper as a whole**

Citizens Advice Scotland do not disagree that the Legal Aid system in Scotland could be simplified and modernised. However, we do not agree that the proposals in this discussion paper offer access to justice for individuals, nor do the proposals offer a long term solution.

The overall discussion paper is premised on saving money from spending on civil matters, with those savings to be rerouted into spending on criminal matters. This money would not be to support more clients, but to increase legal assistance rates (pg. 23) and introduce funding for routine practice which is not currently covered (pg. 24). In other words, criminal legal aid practitioners would continue in the status quo but would be paid more, while civil legal aid would diminish dramatically.

This approach is not a balanced one. It prioritises the needs of criminal legal aid solicitors over the needs of justice users (whether civil or criminal) and in this does not respect the rule of law or the realisation of justice.

The financial aspect of the premise is also fundamentally flawed in failing to understand the way in which Governmental budgets operate. There is an assumption that if any money was saved from civil matters it could be re-distributed to criminal business. In reality, savings in any budget are likely to be treated as such – savings. The legal aid budget is not ring-fenced and so there is a real risk that the proposals in this paper would have the effect of reducing the overall budget with saved money going back into the Government pot to be redistributed in other areas.

What's more, even if the proposals did work in the short-term, this re-distribution would not provide a sustainable fix. Page 23 points out that "overall expenditure on legal assistance has been declining in real terms for years." With no new funding source for legal assistance and continually shrinking budgets at Government level, this proposal does not address what will happen if, in 5 or 10 years' time, criminal practitioners find themselves in the same position again.

### **A client focus**

As above, CAS does not agree that the proposals in the discussion paper offer access to justice for individuals. This is particularly so in civil matters but it would not be right to say that the impact will be felt solely on civil clients: civil legal assistance and criminal legal assistance clients are often the same people. Civil problems and criminal problems are not experienced in isolation from one another. One individual may be at risk of losing their

home, may have issues arising from family breakdown or issues with welfare benefits at the same time as going through the criminal justice system.

To separate civil from criminal interests serves to treat these issues as if they were separate. While this might be true in the eyes of a lawyer – with a criminal lawyer helping with the criminal aspect and a civil lawyer helping with the housing or family aspect – it is certainly not true in the eyes of a client. A person has problems which they are experiencing and it matters not whether the definition is civil or criminal. If a person needs help in accessing justice, the support to which they are entitled should not differ based on the type of legal need they have.

This has been the basis of the legal aid system to date and is a basis which CAS strongly feels should continue.

On the more specific proposals for civil legal aid, we have concerns about the suggestion for removing whole areas from scope (as at page 39):

- breach of contract
- debt
- employment law
- financial only divorce
- housing/heritable property
- personal injury (with the exception of medical negligence)

When read with the aim on page 5 suggesting “abolishing the distinction between advice and assistance, assistance by way of representation and legal aid,” these topics would effectively disappear from scope entirely.

There is precedent from changes to civil legal aid in England which leaves little doubt about the detrimental impact this would have on individuals, civil legal aid practitioners, and the civil court system as a whole. The rise in party litigants in areas where individuals do choose to pursue their rights has caused massive delays and pressure within the civil justice system. Such is the problem that the Ministry of Justice announced in October that it was to launch a network of advice centres to help to support clients and reduce the delays at a cost of £1.4 million.<sup>4</sup>

Removing whole areas of law from eligibility of civil legal aid does not in any way facilitate access to justice.

### **Where else would clients go?**

Further lessons can be learned from England about the assertion that these areas, if removed from civil legal assistance, could “easily and properly” be provided for by the advice sector or

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<sup>4</sup> <http://www.theguardian.com/law/2014/oct/23/legal-advice-litigants-without-lawyers-justice>



on a private client basis. If this were true, English litigants would not be in the situation they are.

Without funding, Citizens Advice Bureaux could certainly not pick up the slack left by such withdrawal 'easily.' The network of advice centres which the Ministry of Justice has had to fund in England and Wales is as a direct result of the problems caused by cuts in legal aid: clients and the court service are struggling because existing services cannot cope with demand.

Demand for the services of Scottish CAB continues to grow. In 2013/2014, one new issue was advised on every 56 seconds. Yet the core funding of bureaux continues to decrease in line with diminishing Local Authority budgets. More and more funding now comes from short-term project funding which is generally granted for specific areas of advice and is unpredictable in terms of renewal. The increase in demand which the proposals in this discussion paper would affect could be catastrophic to all bureau clients.

If such areas did come to CAB as a primary source of advice, the way in which that advice is given would have to be addressed as a matter of urgency. In situations of specialism - as these topics would be - advice is most commonly provided by a paid specialist and not a volunteer. This has clear implications for required funding which are not addressed in the discussion paper. Although on page 38 there is mention of "our proposal for expanding the network of advice centres in Scotland (discussed below)" there is no proposal made. All that is said on page 40 is that advice should be funded, but fundamental questions like where the money should come from or how any money might be distributed are not addressed.

The suggestion that services might be provided on a private client basis is equally problematic. Although the paper points out that many individuals at the higher end of the eligibility scale would be subject to clawback, what the paper fails to acknowledge is that in these situations, there are many clients who decide not to pursue their civil rights because they feel they cannot afford contributions or clawback.

The situation of fees as a barrier has been acutely experienced in the context of employment tribunal fees. Applications to the employment tribunal fell by almost 80% on the introduction of the fees, and applications have stayed low. The Citizens Advice Service continually sees clients who cannot afford to pursue justice:

**A North of Scotland CAB reports of a client who worked for a Supermarket chain and was being bullied by another assistant. She spoke to her manager about the bullying as well as the area manager but nothing was done. The client left her job as the environment was unbearable for her and the company had taken no steps to make it better. The adviser suggested that the client could take her claim to the employment tribunal and she would have a good chance of success, but the client does not have the money to take the case forward and does not qualify for fee remission.**

Employment tribunal fees have introduced a decision as to whether or not it is 'worth it' to pursue civil rights. Access to justice should not come down to such a stark value judgement.



## **Conclusion**

In the wide programme of civil justice reform (which this paper does not in any way acknowledge), CAS have advocated for a whole system approach which allows for accessible and proportionate means to resolve civil disputes. This whole system approach is dependent on access to a variety of advice providers, ADR and legal professionals as and when these different avenues are most appropriate for an individual.

The proposals in this paper would impose a barrier to this whole system approach. The proposals give no heed to civil justice changes to come. Nor do the proposals acknowledge that although there are times when advice and lay representation is the most appropriate option, there are instances where lawyers are essential in the civil justice process.

Citizens Advice Scotland would strongly recommend that these proposals are re-thought.



## CLIFF CULLEY

I managed to have a read of your discussion paper which I considered to be well thought out.

Clearly emphasizing the major cuts already gained by the Government over the last 20yrs through a lack of increase in the rates.

I think could be also emphasised more could be:-

- Particular in Criminal work there has been a significant increase in the complexity and change in the law both procedurally, evidentially and in the law itself over that period. Together with some might say a greater deal of accountability for the legal services provider by the law society, legal aid board and the courts themselves. It is not a field of law (legal aid work) that I imagine many of us would recommend to anybody enquiring of future careers. It is clear there will not be a significant increase in the total legal aid budget.
- I think it right to consider restricting the type of law that you can get legal aid advice on.
- And to limit the financial levels of income that people will qualify for but put in place public funding loans that can be taken out of income at source whether from earned income or benefits and are not left to the solicitor to collect. Thus guaranteeing the repayment of the loan to the state. This is something the state must be able to be setup.
- On Police station advice if you are the solicitor on call I think there should be payment for just being on call. There is significant inconvenience to family life particularly for single parents who have to arrange for baby sitters for the nights on call. Also for all of us in not going to Cinema with children or having a glass of wine ie for the restriction on ones freedom this responsibility does impose.

## CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Dear Alistair

Thank you for forwarding a copy of the Law Society of Scotland Discussion Paper entitled Legal Assistance in Scotland Fit for the 21st Century.

I am sure you will understand that it would not be appropriate for the Crown to provide views on the proposals or suggestions for reform of the provision of legal assistance, however I thought it would be helpful to provide information about the work that COPFS has been doing to increase efficiencies in the criminal justice system which will allow some further context to be given to the suggestions in the paper and some responses that you may receive.

I note that efficiency in the criminal justice system is given as a reason for changing legal assistance. We agree that efficiency in the system is a laudable aim, especially in the continuing challenging financial climate. The system does not operate in isolation and all of the practitioners within the system can have an impact on ensuring joint delivery of an effective and efficient criminal justice system which serves the people of Scotland.

### **Summary Procedure**

The paper highlights at page 18 findings of the Scottish Government Social Research Group and their evaluation of the impact of summary justice reform in 2012. That Research Report highlighted the inconvenience to victims and witnesses caused by time taken for cases to come to trial, adjournments and waiting times in court.

COPFS is committed to working with all stakeholders in the criminal justice system to develop ever more productive working arrangements, especially improving the quality of justice for victims and witnesses. We can all work together to reduce the time it takes for cases to proceed through the system, ensuring that cases which do not proceed to trial resolve early and that trials can take place on the date that they are first set down.

There have been a range of measures put in place by COPFS which all aim to create an environment which encourages appropriate tendering of guilty pleas at the earliest stage of proceeding to avoid the inconveniences that the 2012 report highlighted.

Firstly in all summary proceedings the accused is provided with a summary of the evidence which the Crown has against the accused along with the complaint which sets out the charges before the case calls in court.

This is followed up by an acceptable plea letter to the solicitor who is acting on behalf of the accused as soon as they advise the Crown they have been engaged to represent that accused. The Crown's position on an acceptable resolution of the case is therefore clear to the accused and their solicitor from the outset. This should all allow for early discussion of possible pleas at the pleading diet and avoid pleas of guilty that are going to be offered being delayed until the intermediate diet or trial diet.

COPFS continue to work on improving efficiency. We know sometimes trials do not proceed due to the non-attendance of Crown witnesses. We introduced a Crown Witness Text Reminder System in October 2012. In summary cases where we have the mobile telephone number details of a witness, a text reminder is issued to the witness, 3 days in advance of the trial. There is evidence from survey results that this approach is welcomed by witnesses and also encourages a proportion to attend court that otherwise would have failed to do so. Across the country in excess of 1800 such text reminders are issued each month.

We are working with the Police and Scottish Court Service on the 'System Model' approach in Aberdeen, Edinburgh and Paisley Sheriff Courts. A number of different initiatives have been running across these courts. All were designed to make court proceedings run as smoothly as possible and conclude without any avoidable delay. An evaluation of these initiatives has commenced and a report will shortly be prepared recommending those which should be taken forward for national rollout. In addition there are a number of successful pilots that are already being rolled out to suitable locations.

We consider that those 'System Model' and local court pilots which have been shown to increase efficiencies in summary court work include:

- Police to ensure that the name of the defence agent is included on undertaking forms where known to allow COPFS to provide papers to agents in advance of the pleading diet;
- Copy complaint to be issued by COPFS to defence agent ahead of any undertaking diet, preferably by secure e-mail;
- Police provide COPFS with early access to/possession of CCTV evidence (and the necessary evidential certificate) which in turn can be shared with the defence agent;
- COPFS to display a list of all copy CCTV disks available for defence agents at the court 3 days ahead of the pleading diet;
- Continuation Without Plea motions to be utilised on joint motion at pleading diet to allow a short time to be allowed for Crown and Defence to discuss and expedite resolution of the case;
- COPFS to order all follow up work required post court where within 3 working days of the pleading diet;



- COPFS and local defence bars to commit to agree evidence where possible at ID preparation stage to avoid unnecessary citing of witnesses;
- COPFS to allocate a dedicated depute to provide a consistent point of contact for defence agents to contact with regard to plea resolution prior to intermediate diet;
- COPFS dedicated plea resolution electronic mailbox address to be made available to all agents to support the efficient handling of e-mail correspondence from defence agents for specific courts;
- COPFS email the court rota to local defence agents each Friday with contact details of the deputies conducting the courts for following week;
- Where agents have more than one trial in the court, COPFS and SCS schedule the trials into the same court to make it more convenient for agents;
- COPFS has also piloted the use of a "Plea Manager" role to resolve cases as early as possible, such as proactively contacting agents in the days before the court to discuss pleas or agree evidence, and attending the custody court on a Monday to discuss pleas. Initial results show a 75% plea rate from that custody court.

### **Solemn Procedure**

Proposals for solemn procedure early resolution and the fees for pleas by way of section 76 hearings, or at First Diet, are discussed at page 34.

At the outset I would indicate that we consider there are still too many cases where the plea is ultimately one of guilty which are not resolving until first diet and trial diet.

COPFS Management Information indicates that there were 5,221 Sheriff and Jury cases between December 2013 and November 2014. There were 1,082 pleas by way of section 76 letter 1,826 pleas at first diet and 984 at trial diets. Only 1,329 cases actually proceeded to trial.

Section 76 hearings are a far more efficient way of resolving cases for the criminal justice system than a plea at First Diet. They are often able to be concluded without the Crown wasting resource by preparation of a full report to Crown Counsel and preparation for trial Depute use which simply becomes redundant as a result of a plea of guilty.

There are many benefits to early resolution of the case by section 76 hearing, especially where the section 76 procedure is intimated as early as possible. There is of course the preparation that the prosecutor must devote to the preparation of a case. By the time the case reaches a first diet, the case will require to be fully prepared, and unless the plea has been intimated prior to the first diet, the depute conducting the first diet will have fully



prepared the case for the court hearing. There are greater efficiencies across the whole of the system the earlier a case can be resolved.

In addition the prosecutor currently requires to cite any victims and witnesses in a case by the first diet in Sheriff and Jury cases so the court can be advised at the first diet whether the Crown can proceed to the trial diet fixed. Resolution by early s 76 plea saves not only police, prosecutor and court time, but also avoids inconvenience to victims and witnesses which pleas at a first diet do not achieve as by that stage all will have been cited with a view to having to attend the trial diet.

The new provisions in the Criminal Justice (Scotland) Bill currently before the Scottish Parliament will mean the need to cite before the first diet is removed, however the prosecutor will still require to obtain information from victims and witnesses about availability in order to be able to assist the court in scheduling trials. They will still be inconvenienced and required to provide the information, then remain on notice that the case is not apparently resolving but requires to go to trial and it is likely that they will be required to give evidence.

### **Legal Services in a Digital Age**

COPFS supports the Digital Strategy for Justice in Scotland. The previous experience of COPFS in working with defence agents to introduce the Secure Disclosure Website demonstrates how we can jointly obtain real improvements to how we do things by using digital solutions.

COPFS are committed to further increase the use of digital solutions. As you will know we are now working with the Law Society of Scotland and local Bar Associations to encourage criminal defence solicitors to communicate with us by Criminal Justice Secure Email (CJSM). A number of benefits have been identified. These include:

- The data protection issues of non-secure communication were highlighted in Law Society Journal article from February 2014 which I attach. However, the content of mail being passed between agents and the Crown by means of CJSM is secure;
- The latest virus checking software is used to prevent viruses accessing defence agent systems;
- Speed of communication is improved as is audit trail of communications;
- Secure communication is possible not just with COPFS but with all members of the CJSM network including other solicitors and members of the Faculty of Advocates across Scotland;



- Increased business efficiencies in terms of electronic filing possibilities are obtained as well as savings resulting from significant reductions in postage and stationery costs.

COPFS are pursuing the possibility of service and intimation of court documents by email.

We consider that all of these initiatives provide a more efficient way doing business in the digital world.

I hope that this information is of assistance in providing background to how COPFS is working to improve efficiencies while ensuring better standards of interaction with defence solicitors, victims and witnesses while securing justice for the people of Scotland.

Yours sincerely

**Catherine Dyer**

Crown Agent & Chief Executive



## DAVID KINLOCH

I simply wish to confirm I have ran a criminal defence business for over 25 years in Scotland and the changes in attitude which have been imposed by various governments and the Scottish Legal Aid Board in particular are nothing short of horrendous. In my own view the system needs a complete root and branch overhaul.

In the last 4-5 years my firm now undertake civil legal aid work and the difficulties in that field are perhaps just as serious as those which exist in the criminal field.

Please take this as my mandate and my firms mandate to try to push for a complete overhaul of the system.

## DUNCAN HENDERSON

I support a long term campaign for a better legal aid system.

I think the current document is far too nice to the Scottish Government. At the introduction it needs to set out that there has been no increase in funding since 1995 for criminal legal aid, there have been a series of unjustified cuts and that the current legal aid rate has fallen from 90% of the solicitor's rate to about 20% of what a solicitor needs to charge. Specialisation is now sought by SLAB and most firms. Criminal law and procedure are much more complex that they were 30 years ago. Solicitors have had to shoulder much greater areas of responsibility. If you wish a professional body with high standards of work then it must be paid for on a long term footing.

I would suggest splitting the document between civil and criminal legal aid.

SLAB should wrap up the PDSO or at least ensure that it operates on an equal footing both in terms of duty and in handing out work to local firms ( for example in Inverness it will not give the same undertaking it gave to the Edinburgh bar about referring clients equally to firms).

I think we should stop accepting cuts particularly as the health service and political pensions remain uncut. Law and order is the first consideration of a democracy and we should stop being shunted down the priorities.

## DUNCAN WOODS

I have received and read the discussion document on legal assistance. While I appreciate that forensic examinations and expert reports represent a small proportion of SLAB expenditure, from my experience there is considerable scope in this area for improvements in cost-effectiveness and follow on efficiencies to the criminal justice system. Where your document refers to ensuring the 'best possible advice is available to everyone' I believe that should generally mean legal advisors dealing with legal issues and forensic experts for forensic evidential issues. It is clear that the legal assistance system has not always kept pace with changes in forensic provision and the way it is procured by police and defence. For example, there is now a reduced need for defence examiners to personally check SPA forensic processes and methods, where SPA have now invested in accreditation to international standards and have external auditors. This type of development within the forensic profession (across many jurisdictions) has produced a much more defined boundary between cases that require defence examinations and those which require only evidential evaluation of the prosecution findings. The 'defence access' policy of SPA and the 'technical precognition' process we have recently negotiated with SPA recognise this, but the technical precognition process could be extended in its scope and refined in its implementation. For example, there should no longer be a requirement to travel to SPA laboratories to collect information and analytical results, where that data could be provided by secure email.

Based on my experience in other jurisdictions, accurate defence expert evaluation of the evidential worth of forensic test results, at an early stage, can remove misunderstandings and improve the efficiency of criminal justice. At the other end of the time scale, if forensic issues/questions arise at a late stage, then the response of defence reports can be focused and efficient only if there are also efficient means of SLAB funding and SPA provision of information. On that issue, could the scope of the smartcards be extended to cover forensic experts who routinely work in the Scottish jurisdiction and would that facilitate short notice access to expert forensic advice in order to keep a contested case on track or bring it to an early conclusion?

I appreciate that the discussion document is primarily concerned with the work of solicitors and advocates. It also seems to provide an opportunity for an integrated review of the effectiveness of publically funded defence forensic experts and, given our long term involvement in the Scottish CJS, we would be willing to assist if you feel that would be beneficial.

## EDINBURGH BAR ASSOCIATION

On behalf of the Edinburgh Bar Association we thank you and your team for the considerable work involved in putting together the discussion paper on legal assistance in Scotland. This Association also welcomes the Society's decision to take the initiative in opening a discussion on what our legal aid system should look like as our justice system goes through a process of rapid change.

In formulating this contribution, we have spoken to members on the topics covered in the paper and have sought to encourage individuals to contribute directly, particularly from the civil sphere in which we ourselves have no direct experience.

We can say that amongst the civil practitioners we spoke to, there was support for the proposed reforms to civil legal aid which you suggest, including those to remove certain issues from the scope of civil legal assistance in order to focus resources on others. Reservations were expressed relative to housing issues being excluded due to a fear of patchy geographical coverage of advice on this subject being available to those seeking such advice, many of whom are vulnerable.

The Family Law Users Group discussed the LSS document at their meeting on Tuesday with the family sheriffs. Whilst there was general support for the measures proposed as they are likely to be more remunerative for those practising in this field, there remained a concern that individuals may be denied access to justice if legal assistance was withdrawn for certain types of work. There was also a general view that the outside agencies may not be properly trained, may be inadequately funded or, like the Civil Legal Assistance Office is at present, unwilling to act or appear in court.

The proposal that the system be simplified was popular amongst civil practitioners also, who were supportive of a single continuing grant of legal assistance. We hope that you will receive feedback from civil practitioners directly.

### **Criminal Legal Assistance**

The discussion paper succinctly sums up the decline in funding for legal assistance on pages 24 – 26. This is no more starkly illustrated in the criminal sphere than when one looks at the 1999 fixed fee for a summary legal aid case which was introduced at 550 plus additional blocks for deferred sentences, under 21 remands etc, with the availability of giving advice on an Advice and Assistance certificate beforehand. Today the fee for the same case is 485 with many of the additional block fees abolished and any prior advice subsumed. The rate for conducting a trial has not changed in 15 years.

Today's summary prosecutions are generally more serious (since summary justice reform and increases to summary sentencing powers), more complex (with technical evidence and CCTV more commonplace, special measures for witnesses and more sentencing options) and involve more preparatory work for the solicitor (including identification parades, intimidation of special defences, identification of agreement of evidence and early plea advice, not to mention the work involved in securing a grant of legal aid). Nonetheless, the drive to reduce



the legal aid budget has been relentless with solicitors having to weather cut after cut to fees.

It has to be remembered that, as far as criminal legal assistance is concerned, since the fund is not cash limited, the legal aid spend is directly dependent on the number of people who qualify for legal assistance who are prosecuted, something that solicitors and the courts have no control over. These numbers are influenced (certainly in recent times) by the political drivers of the moment and the number of offences on the statute book which are available for citizens to break. With the widespread removal of discretion on the part of the police officers and prosecutors to decide who they think can be dealt with other than by way of being charged and prosecuted against, the numbers of prosecutions registered in Scottish courts is rising (an increase in summary applications in Edinburgh in 2013/14 of 33% on the previous year), whatever may be said about the behaviour of the crime rate itself.

It therefore follows that the surest way for the justice system to save money would be to prosecute fewer people, for example by warning more motorists and mediating more domestic disturbances. However, if that is not attractive to the powers that be, then prosecutions must be paid for. In such a situation, the earliest possible resolution of cases is of the utmost importance, especially when courtrooms are closing and resources are finite.

Unfortunately this Association's view is that the current legal aid system is hindering the early resolution of cases and reform is required sooner rather than later. In Edinburgh Sheriff and Justice of the peace Courts the situation is acute, where additional trials courts have been laid on to clear a backlog of cases caused by the bow wave of business following the formation of Police Scotland. With the Domestic Abuse Court moving to a five day week in Edinburgh, the increase in business shows no sign of abating.

The situation has been exacerbated by a move towards not guilty pleas in summary business once more, which is disappointing following the shift towards early case resolution following SJR in 2006/7. For the writers, the most significant factor in this regression has been a progressive retreat from the ease with which certainty of criminal legal assistance funding could be achieved when the reforms were first introduced, which has been brought about by the introduction of financial verification processes which have been gradually tightened. This has been coupled with a stiffer approach to assessment for eligibility for representation at first calling if one wants to plead guilty. Whilst these changes have undoubtedly shaved money from the legal aid budget, we believe that they have been counterproductive in relation to encouraging accused persons to plead guilty at an early stage and are an important factor in the numbers of outstanding trials in our courts.

Instead of fixing unrealistic targets for legal aid expenditure, a more holistic approach to the criminal justice budget needs to be adopted – for example how much did the increase in early guilty pleas following SJR save for the system as a whole?

As practitioners, we can advise that worrying about whether we will be paid for the legally aided work that we are undertaking is a daily headache for solicitors.

Certainty of payment for essential work which is conducted in a public forum and which is minuted by a number of different people at the same time and can therefore be readily

audited should not really be an issue. Despite this, criminal legal aid solicitors are subjected to numerous layers of scrutiny, including peer review, yearly audit, Law society compliance and of course scrutiny of the standard of ones work in a public forum by ones peers, the bench and crucially, the accused! Accounts are scrutinised by SLAB to the nth degree and in relation to applications, individual entries on bank statements queried even when the account is hundreds of pounds overdrawn. The administration of the legal aid budget itself costs millions – although SLAB must be congratulated for its online system and the savings it has achieved, its operating costs in 2013-2014 were £14.8 m to administer a spend of £150.8m. Here therefore are some initial ideas which have been fed in to us by members as a starting point for discussion.

### **Police Station interviews**

We agree that a block “callout” fee should apply to all attendances to advise a suspect at any point during the interview process, and a block fee for telephone advice, both without the need for financial verification or means test. The block fee could be set at different rates depending on the time of day.

Since the requirement for the system to provide a solicitor once requested by a suspect is inescapable we see no reason why a convoluted application process needs to be gone through. Accused persons will never have financial documents to hand at the time and rarely feel compelled to send them in after the fact if they are released without charge. Why should this mean that the solicitor must go through a time consuming process in order to get paid for having provided an essential service at the request of the state, because he or she has not seen financial verification to back the information he was given at the time?

For auditing purposes all that should be required would be the suspects name, the location of the police station, the police report number and the times of the attendance.

### **Summary business**

We agree with the proposal for simplification of the system by virtue of a single certificate type. We also agree that the block fee should be the same whether a guilty or not guilty plea is tendered. However, we would go further and suggest that legal assistance be automatic in ALL Sheriff court summary prosecutions.

Our rationale is as follows. Sheriff court summary prosecutions are by far the most common prosecution type. Since summary justice reform, only the more serious levels of summary offending are to be prosecuted at this level (with less serious offences being prosecuted at JP Court level). As we understand it, seriousness is determined by seriousness of offence, criminal record ie repeat offending, breach of court order, likelihood of custodial sentence, length of previous sentence for analogous offence, course of conduct and other similar factors. Also, in recent times, it is our understanding that all “domestic” incidents (whether they involve violence or not) are not to be prosecuted below sheriff summary level.

The maximum sentence available at sheriff summary level is 18 months on a single complaint if a court order has been breached. This is a significant level of disposal. If a non-custodial disposal is imposed, it will frequently be a community sentence, commonly involving

background reports, complex disposals and post sentence reviews. Such serious cases are in our view deserving of an automatic grant of legal assistance. This would remove uncertainty of payment for the solicitor, thus in turn removing the application process (which can take longer than the life of the case if it is resolved at an early stage) which is a potential stumbling block on the road to resolving the case and can produce "churn". It would allow work on the case to commence at once and it would also, we believe, lead to a return to a higher proportion of early guilty pleas and a reversal of the increase of not guilty pleas, a proportion of which are influenced by the longer time frame in which documentation can be gathered and funding secured. This would produce significant savings for the system as a whole not to mention clarity and relief for many complainers and witnesses.

Further, in deciding which cases to prosecute, the crown should be discerning about which cases are deserving of sheriff court time, including so called "domestic" cases notwithstanding the political drivers of the day. Many domestic prosecutions involve no violence or history of abuse. Prosecutors should assess the seriousness of an alleged offence in a commonsense way. We are aware that Crown marking policy in the recent past has paid heed to the legal aid budget by amalgamating crime reports thus incurring a single fixed fee (anecdotal evidence) but we feel that if everyone prosecuted in the sheriff court was entitled to legal assistance, perhaps more thought would be put into deciding which prosecutions were truly deserving of sheriff court time and likely to achieve a conviction (for example we have also seen in recent times complaints raised where there is a clear insufficiency of evidence, usually in domestic cases - these clog up the courts and are invariably dropped at a late stage).

At present, all but the most obviously ineligible will attempt to access criminal legal assistance and many will be borderline applicants. The current system sees a to-ing and fro-ing between SLAB and the solicitor where financial information is batted backwards and forwards, often with the DWP and Crown link failing for one reason or another (one response from SLAB recently stated that the worker had spent a long time on the phone to the DWP and couldn't get through, therefore verification was required!) which leads to periods of time when there is inactivity on the file, whilst at the same time the crown are undertaking work and a court slot has been allocated by SCS. "Churn" is exacerbated by legal aid applications which have not yet been determined, with second applications commonplace due the first being "timed out" after requests for documents have gone ignored.

The criticism we have of the discussion papers proposal that a financial eligibility test remain in summary criminal cases is that determination of the initial application can drag on for months under the current arrangements and we see no reason to believe that this would in any way improve. We believe that it would be better to remove this uncertainty and additional complication entirely. We would suggest that an attempt be made to cost the savings which could be made if early pleas returned to their peak of SJR. If no application were required at all, we suggest that that rate could be improved upon.

However, this does not mean that the decision as to whether to plead guilty or not guilty should be left to the toss of a coin, whether the accused is willing to face sentence at an



early point in proceedings or the availability of time to discuss the case fully prior to the plea being tendered.

One suggestion made to us is that in all cases where a not guilty plea is being contemplated, the grant of legal assistance would depend on the existence of a valid defence or “position” to be set out in a defence statement, in order to sift out frivolous not guilty pleas and free up court time. This would require some scrutiny by the court at first calling.

The defence would be expected to have perused the available disclosure (such as for example the CCTV footage of an alleged shoplifting incident) prior to a plea being tendered. The accused's position would not require to be a complete denial, simply a valid reason for pleading not guilty. This would encourage prosecutors to properly consider plea offers instead of rejecting them at an early stage because they are too busy or cannot be reasonable. It would encourage accused persons to think carefully before giving instructions, as any significant change in instructions would become apparent at trial and it would also focus issues at an early stage allowing for the early agreement of evidence avoiding citation of certain witnesses (as opposed to cancellation post intermediate diet). Such a process would obviously involve more front loading of work on the part of the solicitor and therefore certainty of payment would be essential, but it can be argued that the savings to the system as a whole would be substantial.

We agree that a system of block fees is desirable. These should be automatic and not requiring of an increase application which is automatically granted. At present payment for work properly carried out is abated because such an increase application wasn't made. This is frankly an unacceptable situation since payment is denied after the work has been completed in good faith.

### **Solemn business**

We agree that following automatic cover for the first appearance for all accused persons prosecuted on petition, those released on bail should require to satisfy a financial eligibility test. The longer time frame for solemn prosecutions should enable solicitors to vouch applications and, if the application is unsuccessful, in-gather sufficient funds from the accused PRIOR to final determination of the case, following which, a significant proportion of private clients will no longer be at liberty.

We agree that a case resolution fee should be available for early pleas. According to at least one senior prosecutor, similar payments introduced in respect of High Court cases some years ago led to a significant rise in early pleas. We agree with the idea of a mixture of block fees and time and line charging for cases which proceed to trial and for post conviction work.

### **Appeals**

The current system produces few complaints and any proposal should be similar in structure to the current arrangements.

### **Clawback**



We are of the view that SLAB should be able to clawback legal assistance payments from individuals whose assets have been confiscated under proceeds of crime legislation, especially in cases where the individual's representation in such proceedings are being paid for by legal assistance.

We look forward to continuing to contribute to what is a much needed examination of our system of legal assistance.

## EMPLOYMENT LAWYERS ASSOCIATION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation or policy, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation and policy.

A sub-committee was set up by the Legislative and Policy Committee of ELA under the co-chairmanship of Eleanor Mannion of Renfrewshire Council and Jonathan Chamberlain of Wragge Lawrence Graham & Co to consider and comment on the Law Society of Scotland's discussion paper entitled "Legal Assistance in Scotland Fit for the 21st Century". Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Although the discussion paper deals with both criminal and civil legal aid, this report is concerned with the proposed changes to the civil legal aid and in particular the impact these proposals will have on the practice of employment law and the ability of individuals to litigate and raise tribunal action concerning their employment rights. The sub-committee sought the views from the ELA membership to ensure that practitioners were given the opportunity to be heard on this important topic.

It is ELA's view that there is no merit in the proposals to remove employment cases from the scope of legal aid. The potential savings from this change are minimal, there are serious access to justice and Article 6 concerns and the alternative sources of funding are not workable in an employment law context. These findings are expanded upon below.

### Why is change necessary?

The sub-committee considered why it is perceived necessary to remove legal aid for employment law cases. One of the primary reasons cited in the discussion paper is to balance the requirement to keep expenditure at an affordable level for the Scottish Government with the need for individuals to access legal advice so as to maintain the legal aid system in the long term. On reviewing the Scottish Legal Aid Board's (SLAB) Annual Reports from the last five years, the current expenditure on employment law cases in both advice and assistance and ABWOR is minimal and a tiny percentage of the overall legal aid spend. A summary of the SLAB Annual Report findings are set out at Annex 1. Unfortunately a detailed breakdown of the 2013-2014 figures was not appended to that report to allow for detailed analysis from that period.

What the Reports clearly show is that the amount paid out by SLAB to practitioners in employment cases has fallen year on year with both civil advice and assistance and ABWOR. There is also a decrease in the number of actual accounts paid. In 2011-2012, SLAB paid out on 1,393 employment cases under advice and assistance. In 2012-2013 they paid out on only 980. This is a 30% reduction in accounts paid. In 2011 – 2012 SLAB paid out on 403

employment cases under ABWOR. This was almost halved the following annual period to 212 cases.

The primary explanation for the need to rethink the current legal aid system is cost. Advice and assistance is the most common form of legal aid for employment cases and year on year a higher proportion of employment cases funded through legal aid do so through on an advice and assistance basis. When looking at the level of advice and assistance paid out in employment cases as a percentage of other civil advice and assistance cases and legal aid as a whole, it is quite clear that employment cases are not a burden on the current legal aid system.

- In 2010 – 2011 the employment accounts paid as a percentage of civil advice and assistance spend was 2.3%
- In 2010 – 2011 the employment advice and assistance accounts paid as a percentage of the total legal aid spend was 0.3%
- In 2011 – 2012 the employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was 2.2%
- In 2011 – 2012 the employment advice and assistance accounts paid as a percentage of the total legal aid spend was 0.2%
- In 2012 – 2013 the employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was 1.4%
- In 2012 – 2013 the employment advice and assistance accounts paid as a percentage of the total legal aid spend was 0.1%.

Similar percentages levels can be seen with civil ABWOR which is granted in fewer cases.

- In 2010 – 2011 the ABWOR employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was 13.9%
- In 2010 – 2011 the ABWOR employment accounts paid as a percentage of the total legal aid spend was 0.4%
- In 2011 – 2012 the ABWOR employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was 13.2%
- In 2011 – 2012 the ABWOR employment accounts paid as a percentage of the total legal aid spend was 0.3%
- In 2012 – 2013 the ABWOR employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was 6.6%
- In 2012 – 2013 the ABWOR employment accounts paid as a percentage of the total legal aid spend was 0.2%

While ABWOR as a percentage of advice and assistance is higher, especially given the lower number of cases where ABWOR is granted, it must be remembered that ABWOR is granted owing to the complexity of the case or length it is expected to run. Even so, the percentage level between 2011 – 2012 and 2012 – 2013 halved.

It is clear from even a cursory glance of these figures that employment law is not a particular drain on the legal aid fund. In 2012 – 2013 both advice and assistance and ABWOR was 0.3%

of the total spend. If the expectation is that removing this area of law from the scope of legal assistance will free up funds to be reinvested elsewhere, any saving will be nominal at best.

It is ELA's submission that these contentious proposals in terms of employment cases will not be of financial benefit to SLAB and so the balance lies with providing individuals access to advice.

### Access to Justice

One of the primary concerns raised by members was that the removal of legal aid for employment cases would have a detrimental impact upon access to justice. It is ELA's view that the proposals outlined at page 39 of the discussion paper may impede the exercise of the Article 6 right to a fair hearing. This is particularly concerning given that legal aid for employment law was introduced following an Article 6 challenge. This was discussed in an article published in the Journal of the Law Society of Scotland on 1st December 2000 entitled "Legal aid for employment tribunals -at last" by Roger Mackenzie and Ken Hogg. The article recorded that "the Executive took advice that continued refusal to grant legal aid [in employment cases] would almost certainly breach the Article 6 right to a fair hearing." It would appear that the advice taken was in light of a devolution issue point taken by a Claimant in the employment tribunal case of *Gerrie v Ministry of Defence S/100849/99*. The Journal article suggested that Gerrie had been "instrumental in forcing the Executive's hand". It had been argued before the Employment Tribunal for Mr Gerrie that the failure by the Scottish Executive to provide for legal aid representation for him in that case was a breach of his rights under Article 6 of the European Convention on Human Rights.

It appears to ELA that if the reason for the introduction of legal aid for employment cases was in order to ensure compliance with Article 6, then its removal from those cases will reopen the argument on the question of compliance with Article 6.

Gerry Brown, then the Convener of the Society's Legal Aid Committee, stated in the above mentioned article that "The introduction of legal aid to employment tribunals is a welcome step towards extending access to justice and equality of arms. These regulations are a direct result of the introduction by the Executive of the Human Rights Act." It appears to us that not only did the Legal Aid Committee recognise that Article 6 was the catalyst for the introducing legal aid for employment cases but that the Legal Aid Committee welcomed its introduction.

The discussion paper refers to the inclusive scope of legal aid as "admirable" as though it is a moral choice that goes beyond the minimum legal protection for individuals in Scotland. It is ELA's submission that providing and retaining legal aid for individuals in employment cases is more than an admirable position to be held; it is an established and respected requirement in terms of Article 6. It was noted by one member that "this is an issue that has been raised repeatedly in England in the wake of the withdrawal of legal aid from most family disputes, particularly by the President of the Family Division of the High Court, Sir James Munby, who has made it clear that in some complex custody disputes, for instance, the absence of an

opportunity to be legally represented would be a breach of Art 6; Sir James has even raised the possibility of ordering the Ministry of Justice to fund representation in one case."

Another member opined that "My experience of funding cases through legal aid is that it allows many cases to be brought to Tribunal which would not otherwise be brought because of the cost of doing so.....For many, the bottom line in these matters is cost. Given the costs associated with instructing a solicitor, particularly when considering the relatively modest average Employment Tribunal awards, many clients are priced out of the market". Without legal aid, many clients would not be able to afford to bring these cases. Already legal assistance is dependent on the potential value of the claim. Employment cases are decidedly different to other areas of civil law where compensation is a remedy. Firstly, compensation is only one remedy. There is also the possibility of reinstatement or reengagement. In discrimination cases, a Claimant can request a declaration, that they were discriminated for example, or a recommendation from the Employment Tribunal which can be as varied as amending a discriminatory policy or ordering that members of staff undergo training.

Secondly, where compensation is sought by the Claimant, it is calculated in terms of their loss of earnings. The compensatory award is capped at £76,574 or a year's salary, whichever is lower of the two. The median award for an unfair dismissal case in 2013 – 2014 was £5,016. Each side bears their own cost irrespective of who wins. Added into the mix is the particularly high percentage of cases where an employer defaults on paying the award ordered by the Tribunal. A survey by the Department of Business Innovation and Skills in 2013 found that only 53% of Claimants were paid their award in full or in part. A Claimant of limited means who does not have access to legal aid is unlikely to raise a claim. Employment practitioners have already seen the dramatic fall in the number of cases brought due to the introduction of Tribunal fees. It is felt that the removal of legal aid will be the final straw so that only those who can pay can assert their rights. It is suggested in the discussion paper that there are alternative sources of advice for individuals over and above a solicitor such as law centres, advice shops or specialist organisations. ELA recognises the integral part law centres and the Citizens Advice Bureau play in assisting individuals assert their employment rights and representing them before the Employment Tribunal. These alternative advice sources rely on legal aid themselves.

Removing legal aid for these cases will place pressure on their already strained financial resources. One member notes "The Equality and Human Rights Commission has had its funding for supporting litigation cut to such a degree that it can only support a very small fraction of discrimination cases". Another noted that some law centres only deal with particular types of claim such as discrimination or wage claims and that they "are often approached by clients who have had their initial advice from a law centre or advice bureau but who require further specialist assistance to bring their case to Tribunal because that is not something offered by the bureau, for example because of the complexity of the situation".

Quite apart from these, the discussion paper does not offer any suggestion on how these advice sources can continue to operate to the current level if legal aid is removed.

## Alternative funding options

As outlined above the justification for removing legal aid for employment cases is a "reduction in expenditure". Further the discussion paper asserts (without any material evidence to support that assertion) that the issues that arise in employment law cases "are such that [funding] could easily be provided either by the advice sector or on a private client basis through a range of funding options including speculative fee arrangements, loans for legal services, and payment plans involving deferral or instalments" (page 39).

It is difficult to see how these alternative funding options in employment law cases would have any practical, let alone significant impact on filling the gap that would be created by the removal of legal aid from those cases. The rules governing the award of expenses in the Employment Tribunal and the Employment Appeal Tribunal are very different from the regime that operates in the ordinary courts. The general rule in the Employment Tribunal is that expenses do not follow success. In fact, an award of expenses is still a rare occurrence and may be made in very limited circumstances. The rule governing the general power to make an award of expenses in the Employment Tribunal is that an order may be made where the Tribunal considers that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or any claim or response had no reasonable prospects of success (The Employment Tribunal Rules of Procedure rule 76 SI 2013/1237). A similar, although not identical, rule applies in the Employment Appeal Tribunal. An award of expenses remains the exception rather than the rule, something that was recently commented upon by the Court of Appeal in *Unison v Kelly* [2012] IRLR 951 at 952, para 17: "... the jurisdiction is essentially a cost free one at the lower levels of the hierarchy and I accept that there is an important public policy objective which is in issue here...".

It is surprising, therefore that the discussion paper should advance the proposition that speculative fee agreements are "particularly useful for ... employment". The opposite is the case. One member noted that "these agreements are themselves becoming increasingly difficult to manage for anything but the highest value cases". Another stated that they are rarely offered "perhaps [because of] the inability to recover costs from the losing party."

Unbundling/staged fees and instalment plans were also viewed as being unrealistic due to the difficulty with managing the client and collection, particularly after the event. In many cases those bringing claims to the Employment Tribunal do so because they have lost their jobs. In that circumstance, borrowing to fund litigation may simply be unaffordable and unadvisable.

The suggestion that solicitors lend to clients was described by members as "incredible" and one that presents a potential conflict of interest. For the majority of members, if there is an alternative funding option such as trade union membership or legal expenses insurance, it is already utilised. Legal aid is a last resort but often the only option for low-paid workers.

2011 – 2012 Annual Report – ‘Civil Legal Assistance’ Appendix

Intimations of civil advice and assistance for Employment:

-2010-2011: 1,903

-2011-2012: 2,068

Accounts paid and average case costs – civil advice and assistance – Employment (2011-2012):

-Number of Cases: 1,393

-Solicitor: £358,000

-Solicitor Outlays: £12,000

-Counsel Outlays: £7,000

-Total Outlays: £19,000

-Total Paid (2011-2012): £377,000

-Total Paid (2010-2011): £404,000

-Average Case Cost (2011-2012): £271,000

-Average Case Cost (2010-2011): £222,000

Employment accounts paid as a percentage of the total accounts paid for civil advice and assistance

(2010-2011) = 2.3%

Employment accounts paid as a percentage of the total legal aid spend (2010-2011) = 0.3%

Employment accounts paid as a percentage of the total accounts paid for civil advice and assistance

(2011-2012) = 2.2%

Employment accounts paid as a percentage of the total legal aid spend (2011-2012) = 0.2%

Accounts paid and average case costs – civil ABWOR for Employment (2011-2012):

-Number of cases: 403

-Solicitor: £434,000

-Solicitor Outlays: £25,000

-Counsel Outlays: £23,000

-Total Outlays: £48,000



- Total Paid (2011-2012): £482,000
- Total Paid (2010-2011): £598,000
- Average Case Cost (2011-2012): £1,195
- Average Case Cost (2010-2011): £1,528

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total accounts paid for civil advice and assistance (2010-2011) = 13.9%

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total legal aid spend (2010-2011) = 0.4%

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total accounts paid for civil advice and assistance (2011-2012) = 13.2%

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total legal aid spend (2011-2012) = 0.3%

2012-2013 Annual Report – ‘Civil Legal Assistance’ Appendix

Intimations of civil advice and legal assistance for Employment:

- 2011-2012: 2,068
- 2012-2013: 1,857

Accounts paid and average case costs – civil advice and assistance for Employment (2012-2013):

- Number of cases: 980
- Solicitor: £208,000
- Solicitor Outlays: £6,000
- Counsel Outlays: £2,000
- Total Outlays: £9,000
- Total Paid (2012-2013): £216,000
- Total Paid (2011-2012): £365,000
- Average Case Cost (2012-2013): £221,000
- Average Case Cost (2011-2012): £265,000

Employment accounts paid as a percentage of the total accounts paid for civil advice and assistance

(2012-2013) = 1.4%

Employment accounts paid as a percentage of the total legal aid spend (2012-2013) = 0.1%

Accounts paid and average case costs – civil ABWOR for Employment (2012-2013):

-Number of cases: 212

-Solicitor: £291,000

-Solicitor Outlays: £15,000

-Counsel Outlays: £18,000

-Total Outlays: £33,000

-Total Paid (2012-2013): £324,000

-Total Paid (2011-2012): £493,000

-Average Case Cost (2012-2013): £1,529

-Average Case Cost (2011-2012): £1,186

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total accounts paid for civil advice and assistance (2012-2013) = 6.6%

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total legal aid spend (2012-2013) = 0.2%

## EQUALITY AND HUMAN RIGHTS COMMISSION

I refer to the Discussion paper on proposals to reform legal aid, Legal Assistance in Scotland, Fit for the 21st Century? We are considering the terms of the discussion paper.

As you may be aware, the Equality and Human Rights Commission (EHRC) promotes and enforces the laws that protect our rights to fairness, dignity and respect. We are the National Equality Body (NEB) for Scotland, England and Wales, working across the nine protected characteristics set out in the Equality Act 2010: age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment. We are an "A-status" National Human Rights Institution (NHRI), and share our human rights mandate in Scotland with our colleagues in the Scottish Human Rights Commission (SHRC).

The Law Society has recently updated its Equality and Diversity Strategy, which recognises that the Equality Act 2010 places a general duty on public authorities to have due regard, when carrying out their functions, to the need to:

- eliminate unlawful discrimination, harassment or victimisation in relation to the nine protected groups;
- to advance equality of opportunity in relation to the protected characteristics of sex, race and disability, religion or belief, sexual orientation, age, gender reassignment and pregnancy and maternity; and
- to foster good relations in relation to each of the protected characteristics.

We welcome the statements within the Strategy document that "The Strategy is intended to set in train the actions required by the Society to meet this general duty", and further that "Although the Society is not obliged to meet the requirements of any specific duties introduced by Scottish Ministers for the better performance of the general duty, as discussed above, the Society will seek to follow the requirements of any specific duties laid down so far as it is possible to do so under the Equality Act 2010."

In light of the requirements of the public sector duty and the Society's undertaking in the Strategy, I shall be grateful if you will let me have a copy of any Equality Impact Assessment you may have carried out, or evidence of how, in the development of the discussion paper, due regard has been given to the needs of the duty.



## FACULTY OF ADVOCATES

### Introduction

1. The Faculty of Advocates welcomes the opportunity to comment on the Law Society of Scotland's discussion paper on Legal Assistance in Scotland. The two branches of the legal profession have a common interest in securing access to justice for all the people of Scotland.
2. The Faculty of Advocates has, as the Lord President observed in 2014, a longstanding commitment to access to justice for all in our society. That is reflected, today, in the cab-rank rule (which has, since 1532, been a condition of admission to the public office of advocate), in the willingness of advocates to represent clients on a speculative basis, and in the work of the Faculty's Free Legal Services Unit. The availability of all counsel for instruction by any firm of solicitors, on behalf of any client, itself promotes access to justice.
3. The Faculty does not intend to comment in detail on the discussion paper, but rather to indicate those proposals and suggestions which it supports and those which it cannot support. It does so in the context of a firm commitment to the importance of access to justice.

### General context

4. Scotland has long recognised that skilled legal advice and representation is key if access to justice is to be effective and meaningful. In 1587, the Scottish Parliament accorded accused persons the right to be represented by counsel – some 150 years before legal representation started to become the norm in England's criminal courts. Even earlier – in 1424 – the Scottish Parliament enacted legislation requiring the appointment of advocates to represent poor litigants.
5. The availability to all; who need it of effective legal advice and representation is a condition not only of a just society, but also one of which, through its respect for the rule of law, secures economic success. The principle that skilled legal advice and representation should be available to all who need it is reflected in the continuing commitment of the Scottish Government and the Scottish Legal Aid Board to maintaining the scope of legal aid cover. This commitment contrasts markedly with the position in England and Wales. The Faculty expresses its firm support for that continuing commitment of the Scottish Government and of the Board. The Faculty notes, with some dismay, the Law Society's suggestion that the scope of civil legal aid should be radically reduced. The Faculty opposes that suggestion for the reasons set out more fully below.

### Streamlining the system

6. The Faculty would support proposals to reform the legal aid system with a view to reducing complexity and increasing efficiency. A system which is more easily understood and more easily operated would facilitate access to justice. Insofar as such improvements to the system resulted in applications being processed at less administrative cost to the Board or to solicitors, this would be advantageous. Solicitors are much better placed than the Faculty to suggest practical improvements to the administration of the system.

### Fair remuneration

7. The Faculty also agrees that the legal aid system should provide a reasonable remuneration for work done. It is a matter of concern of both branches of the profession that rates of remuneration under the legal aid system have not been kept under review.

### Reform of the justice system

8. The Faculty agrees that the legal aid system should not be considered in isolation from other reforms or potential reforms of the justice system. There are a number of points that may be made.

8.1 Legal aid for civil and criminal proceedings should align with the procedures of these courts. Reforms to court procedures may require reforms to the legal aid system, so that the funding stream reflects the steps that are required by the relevant procedures. Likewise, changes in criminal procedure – such as the requirement for police station interviews – require to be properly reflected in the payments made for work reasonably or necessarily done.

8.2 Procedural reform, insofar as it removes inefficiencies and unnecessary work, may generate savings across the system, including the legal aid fund. The Faculty has, for example, suggested, to no avail, that the requirement to produce defence statements in solemn criminal cases could be repealed with no adverse impact on the administration of justice, but with a cost saving. On the other hand, those responsible for the legal aid system require to recognise that some procedural reforms, designed to generate efficiencies in the court process, may nevertheless require additional work, which requires to be remunerated. The procedural reforms in the Inner House, for example, require substantial advance preparation of cases, which requires to be reasonably remunerated – but those reforms are, in the Faculty's view, justified by the potential savings in court time.

8.3 The Faculty agrees that the legal aid provision should support the efficient and effective conduct of litigation. The Faculty does not consider that it would be



consistent with the interest of justice for legal aid to be used to create perverse incentives as regards pleas or settlement, but equally recognises it would be consistent with the interests of justice for the legal aid system to support the front-loading of work on a case, which may, in turn, promote early settlement.

#### Removing areas of scope from legal aid

9. The Faculty does not support the suggestion that significant areas of work should be removed from the scope of civil legal aid. The areas identified in the Law Society's discussion paper are breach of contract, debt, employment law, financial only divorce, housing/heritable property and personal injury (with the exception of medical negligence).

9.1 This proposal is inconsistent with the principle that skilled legal advice should be available to all who need it. The areas of work which have been identified by the Law Society of Scotland include areas which are most likely to be of concern to the most vulnerable in society – including housing, debt and employment law. The Faculty does not accept that it would be fair or just to treat individuals who have sustained a civil wrong, or who face the loss of a house or a job, less favourably in relation to access to legal advice and representation than those who face a criminal charge.

9.2 The Faculty acknowledges that some, at least, of the areas of work identified are often – though by no means exclusively – dealt with, in the first instance, by the advice sector, and that the Society's proposal is predicated on the statement that it would be "critical that the organisations that currently provide high quality specialist advice in many of these areas... are able to continue to provide such advice with the confidence of secure and adequate funding." The Faculty endorses the importance of the work of the advice sector (which it supports through its Free Legal Services Unit) but it does not accept that the advice sector can or should be expected to substitute for the availability of legal aid in these areas of work. Further, the Law Society appears to envisage no more than the continuation of the existing level of support for advice services. If legal aid were to be removed from the areas identified, the Faculty anticipates that there would be a need to increase the provision of advice services.

9.3 Advice services cannot, under the present law, conduct litigation on behalf of individuals. Where the individual concerned requires to raise or defend legal proceedings, the removal of these cases from the scope of legal aid would have the consequence that the individuals concerned would require to pursue or defend these proceedings themselves, without the benefit of legal representation. This is the real flaw in the Law Society's proposal. In court proceedings, individuals require to be effectively represented and, in that context, advice



services, however effective, cannot substitute for legal representation. The result of the Law Society's proposal would likely be a very significant increase in the number of self-represented litigants or of litigants being assisted by unregulated lay advisers.

9.4 The Law Society's suggestion that work be removed from the scope of legal aid is the approach which has been taken in England and Wales. Experience in that jurisdiction would support the view that the Law Society's suggestion would be likely to result in:

- (a) A significant increase in party litigants;
- (b) Increased delays in court and additional burdens on already stretched court resources;
- (c) Increased and likely unsustainable pressure on frontline providers providing free legal support, advice or representation; and
- (d) A growing reluctance of solicitors and advocates to take on complex, low-value litigation, denying many access to legal advice and representation.

Experience in that jurisdiction would also suggest that, where the court considers that justice cannot be done without expenses being incurred, the costs will simply require to be met from other public resources.

9.5 The Law Society suggests possible funding mechanisms which might be invoked to enable at least some such litigants to secure representation. The Faculty would welcome the development and use of alternative funding mechanisms, but those proposed are most unlikely to fill the gap. The Faculty also acknowledges that the Law Society envisages that a system should be in place to ensure that in "exceptional cases", legal assistance can be made available by discretion. This too will not fill the gap. It is of the nature of an "exceptional cases" provision that it is available only where the case is exceptional in some way. Ordinary people who have suffered wrongs, or who are in distress, but whose case is not "exceptional" would be excluded. The "exceptional cases" exception in the English legislation has been controversial, and has generated litigation<sup>3</sup>. Any discretionary system is likely to promote uncertainty and to undermine the aim of simplifying and streamlining the system.

## FACULTY OF ADVOCATES EMPLOYMENT LAW GROUP

### Scope of the Response

1. This is a response on behalf of the Faculty of Advocates Employment Law Group to the Law Society of Scotland Discussion Paper, *Legal Assistance in Scotland – Fit For The 21st Century* ("the Discussion Paper").
2. Although the Discussion Paper is wide ranging, this response is directed at the proposal that employment law – which it is assumed is short-hand for all cases that fall within the jurisdiction of the Employment Tribunal - be removed from the scope of legal aid completely. That is not to say that good reasons do not exist for maintaining legal aid for those other areas of the law that the Discussion Paper also proposes should be taken out of the legal aid regime. No doubt others will make the arguments for those areas.

### Background to Legal Aid Provision

3. In January 2001, the Scottish Government extended the availability of legal aid to allow legal representation in Employment Tribunal hearings (*Advice and Assistance (Assistance by Way of Representation) (Scotland) (Amendment) Regulations 2001: SSI 2001/2*). Prior to that, legal aid had been restricted to pre-hearing procedures only. The change came about after the *Human Rights Act 1998* came into force and the subsequent legal challenges under Article 6 of the European Convention on Human Rights. Prominent among those was the case of *Gerrie v Ministry of Defence* (ET Case No. S/100842/99 (unreported)) which raised the issue of equality of arms due to the absence of legal aid in employment cases, although the amendment to the legal aid rules had the consequence that the point of law did not have to be decided in that case (*Employment Tribunal Practice in Scotland* (W Green Sweet & Maxwell) para 8-17; *The Scottish Human Rights Service* (W. Green Sweet & Maxwell) para C3.010). Legal aid continues to be provided for appeals to the Employment Appeal Tribunal and to the Inner House.
4. In presenting the proposals, for the introduction of legal for Employment Tribunal hearings, to the Justice and Home Affairs Committee of the Scottish Parliament, it was observed that "[t]hese proposals mark a positive step towards improving access to justice in Scotland ... [and the] ... changes will ensure that we meet our obligations under the European Convention on Human Rights: but they would be worth making in any case. ... This will improve access to justice for many people who have to take a case to an Employment Tribunal." (*Legal Aid for Employment Tribunals, News Release: SE3211/2000, 12 December 2000, The Scottish Government*)
5. The Convener of the Law Society of Scotland's legal Aid Committee at the time described the move to extend legal aid in this way as "a welcome step towards extending access to justice and equality of arms" (JLSS 45 No 12, p 30 – *Legal Aid for*



*employment tribunals – at last*). The arguments that existed in 2000 remain just as valid today.

### Meeting the Discussion Papers's Arguments

6. The Discussion Paper offers to justify the removal of employment law cases from the scope of legal aid. Part of the justification for that removal is a "reduction in expenditure". The Discussion Paper further asserts (without any material evidence to support the assertion) that the issues that arise in employment law cases "are such that [funding] could easily be provided either by the advice sector or on a private client basis through a range of funding options including speculative fee arrangements, loans for legal services, and payment plans involving deferral or instalments" (Discussion Paper, p 39). Those options could equally be adopted in relation to disputes raised in the ordinary courts and yet are not advanced as a justification for the abolition of support in those cases. Moreover, the alternatives suggested are in fact less appropriate for cases brought in the Employment Tribunal than the ordinary courts, particularly in relation to speculative arrangements, given the generally low value of awards in employment cases and the operation of the rules on expenses.
7. It is difficult to see how a speculative fee regime in employment law cases would have any practical, let alone a significant, impact on filling the gap that would be created by the removal of legal aid from those cases. The rules governing the award of expenses in the Employment Tribunal and the Employment Appeal Tribunal are very different from those that apply in the ordinary courts. There is no general rule that expenses follow success. In fact, an award of expenses is still a rare occurrence and may be made only in very limited circumstances. The general power to make an award of expenses in the Employment Tribunal operates where the Tribunal considers that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part of them) or the way that the proceedings (or part of them) have been conducted; or any claim or response had no reasonable prospects of success (*The Employment Tribunal Rules of Procedure* rule 76: SI 2013/1237). A similar, although not identical, provision applies in the Employment Appeal Tribunal. That an award of expenses remains the exception rather than the rule, was recently underlined by the Court of Appeal in *Unison v Kelly* [2012] IRLR 951 at 952, para 17: "... the jurisdiction is essentially a cost free one at the lower levels of the hierarchy and I accept that there is an important public policy objective which is in issue here...". It is surprising, therefore that the Discussion Paper should present the proposition that speculative fee agreements are "particularly useful for ... employment". The opposite is the case.
8. The Discussion Paper also suggests that this work could be provided through other agencies such as law centres, advice shops and specialist organisations. The reality is, as the Discussion Paper recognises, that such a shift in the provision of specialist employment advice and representation, will require adequate public funding. On that



basis, the potential for an ultimate financial benefit to the public purse seems very limited.

9. Employment law is a complex and developing area of the law that affects all working women and men in Scotland and, in many cases, job applicants as well. Many of the rights that it seeks to protect reflect strong public policy issues emanating from the EC as well as the UK. Those factors were recognised in 2000 by one solicitor who wrote, having in mind EC law in general and the TUPE Regulations in particular, that “[s]uch complexity has led to the inescapable conclusion that at some time legal aid would have to be considered for those who might qualify and who merit legal assistance in the presentation of the case.” (JLSS 45 No 12, p 31– *Legal Aid for employment tribunals – at last*).
10. As for the other examples of private client funding, in many cases those bringing claims to the Employment Tribunal do so because they have lost their jobs. In that circumstance, borrowing to fund litigation may simply be unaffordable and an unacceptable risk for most potential litigants.

#### **New Proposal?**

11. But perhaps the idea of affordable loans provided through SLAB could assist with the current crisis brought about by the introduction of fees in the tribunal system. Those fees are recoverable as a general rule where a claimant succeeds. That would potentially be a proposal that the Faculty of Advocates Employment Law Group could support.

## FAMILY LAW ASSOCIATION

### GENERAL COMMENTS.

The Law Society paper was circulated to our members with a request for feedback from the membership and this response incorporates the responses from our members and the views of the Committee. The F.L.A. supports the aims of the Law Society Legal Aid Committee in producing the document. It is agreed that a robust system of publicly funded legal assistance is fundamental to maintaining meaningful access to justice for members of the public who may not have the necessary financial resources to access justice by other means. It is essential therefore to allow solicitors who deliver this service to be adequately remunerated to ensure that the profession can continue to regard provision of this service as a viable sustainable career option while ensuring members of the public most in need are able to access justice and also satisfying the need to limit public expenditure to a level that can be funded by the Scottish Government in the interest of all stakeholders.

### SPECIFIC COMMENTS.

Specific comment on the document are restricted to civil legal aid and in particular sections relating to Family and Child Law.

Chapter 33AA of the Sheriff Court Rules was introduced in June of 2013 and introduces new procedural requirements including attendance by agents at a case management hearing in court. It is a matter of some concern to our members that these new procedural requirements are not fully covered in existing civil legal assistance regulations. This is clearly a matter that requires to be addressed urgently as legal assistance regulations require to keep pace with court reforms which seek to improve case management and reduce delay in bringing cases to conclusion in the interests of parties and children.

The following comments relate to page 37 of the document onwards;

#### 1. Single Continuing Grant.

Comments contained in this section are agreed.

#### 2. Financial Eligibility.

Comments contained in this section are agreed.

#### 3. Thresholds.

Comments contained in this section are agreed.

#### 4. Subject Matter of dispute.

Comments contained in this section are agreed.

#### 5. Scope of Civil Legal Assistance.

The general comments in this section are agreed subject to the view that financial only divorce should not be withdrawn from Civil Legal Assistance. While there is already some provision for advice in other areas mentioned, e.g. debt, from in court advice services or C.A.B. there does not appear to be provision for advice in division of financial assets on divorce. Further this is an area of expertise that should not be grouped with what might be considered low value cases and many agents working in this field are accredited specialists. In addition some practical issues arise. For example if an action is commenced as a financial only divorce but the defender introduces craves relating to children of the marriage which will qualify for civil legal assistance how will SLAB apportion work done. Is it suggested that this scenario would automatically render the work done on financial aspects of the divorce as eligible for civil legal assistance. Will work done on the child law aspects be subject to claw back if there is financial recovery? Increasing numbers of solicitors will not undertake financial division divorce on a civil legal assistance basis as it is increasingly not financially viable for them to do so but the general view expressed in responses from our members is that the option should be available for solicitors to do this type of work under the legal assistance scheme.

There is considerable support however for alternatives forms of funding for this type of work as the current position in relation to claw back in the event of possible recovery provides considerable difficulty. In particular this type of work will invariably require the solicitor to incur large outlays in valuing assets e.g. to a pension actuary, which SLAB will not reimburse during the case on the grounds there is a prospect of the client making a financial recovery and SLAB refuses any application for reimbursement of the outlay on the basis the client should pay the outlay at the conclusion of the case. The practical outcome for the solicitor is either the outlay is not paid to the 3rd party for a considerable period while the case is ongoing resulting in the threat of proceedings for payment by the 3rd party or the solicitor pays the outlay which adversely affects the cash flow of the business. Neither option is viable and this one issue alone has resulted in many solicitors being forced to refuse to undertake this type of work resulting in a lack of provision of this type of work for members of the public who qualify for civil legal assistance.

Further, in relation to the issue of recovery there was support for a suggestion from our members that should a client who has the benefit of funding from the civil legal assistance scheme make a substantial recovery, as is frequently the case when the other spouse has



substantial assets but the client spouse has none and therefore qualifies for civil legal assistance, the solicitor should be entitled to charge at a rate higher than the legal assistance rates at the end of the case with support for the contention that private fee rates would be appropriate. Set criteria as to when this would apply would be required so that the client can be advised at the outset of this possibility but this is deemed necessary as such cases can involve complicated issues and high net value assets requiring expertise in this area from the solicitor. As a result of the work of the solicitor the client may recover substantial assets but the resultant fee paid by way of claw back can be minimal compared to the value of assets recovered and the degree of complexity and responsibility for the solicitor. Further the current system appears to place the client who benefits from public funding and makes a substantial financial recovery in a more favourable position than a fee paying client as the fee paid is substantially less.

#### 6. Alternative Sources of Advice.

Comments contained in this section are agreed.

#### 7. Alternative Sources of Funding.

Comments contained in this section are agreed.

#### 8. Private Client Options.

Comments contained in this section are agreed.

#### 9. Legal Assistance Loans.

Comments contained in this section are agreed and in particular there was support for affordable loans being made available by the Government through SLAB to members of the public who do not qualify for legal assistance.

#### 10. Exceptional Case Status.

Comments contained in this section are agreed.

#### 11. Children's Legal Assistance.

Comments contained in this section are agreed.

### CONCLUSION.

The Family Law Association supports the general aim of the discussion paper subject to the above comments and fully endorses the view expressed in the document that the best solutions are found when stakeholders work constructively in a spirit of shared



understanding and , further, the Association endorses the need for an urgent review of the current system of publicly funded Civil Legal Assistance to ensure meaningful access to justice for members of the public who may not have the necessary financial resources to secure access to justice by other means.

MARGARET CARLIN.

VICE CHAIR.

COMMITTEE OF FAMILY LAW ASSOCIATION OF SCOTLAND



## GERRY KELLY

Thanks for your hard work on this paper.

I would support 95% of your comments and what you propose.

Much new extra work is having to be done for free under civil legal aid eg summaries of witnesses' evidence being lodged in advance of proof and many sheriffs requiring written submissions.

I am wary of the suggestion that certain areas of work be removed from the scope of legal aid as you may find that the Government will seize on that concession and remove those areas of work without the counterbalancing increase in fees which you seek in other areas.

I have often thought that the requirement to pay for shorthand writers in civil cases is unnecessary and outdated. Equally, I have always wondered why SLAB seem willing to pay for increased sheriff officer's fees every year.

Thanks once again for the time and effort which you have put in to your paper and for trying to make matters better for the profession - with the direct consequence that the public would benefit as a result from a stronger legal profession.

## GLASGOW BAR ASSOCIATION

### **'Legal Assistance in Scotland'**

We recognise the need to modernise and improve the criminal legal aid system, particularly in order to ensure that it meets the requirements of the criminal justice system which has faced many significant changes in recent years. We also welcome the carefully researched Discussion Paper produced by the Law Society of Scotland and agree that the system has become too piece-meal and requires to be more efficient, straightforward and user friendly in order to save public expenditure in the justice system.

We can comment as follows in relation to the Law Society's proposals;

### **SIMPLIFIED/UNIFIED SYSTEM**

We agree wholeheartedly that there should be simplification of the rules and application process and that a single system of criminal legal assistance would improve the system and presumably reduce administrative work within the Scottish Legal Aid Board (Slab). In addition we support a unification of the rates of payment. Currently civil, children's and criminal are all paid at different rates with additional different rates for ABWOR. We do not consider that just. Discrepancies in the rates is seen across the board with distinctions in advocacy rates; waiting/time; precognition fees; perusals; letters; telephone calls. The difference in the drafting rates between solemn and children's work for example are significant and do not seem to be based on logic. Further, a 'page' for perusal/drafting purposes differs in terms of word count under A&A and full civil. There are lots of examples within the system which make no sense and simply reflect the piecemeal way Slab have historically made cuts resulting in an incoherent system.

### **ACCOUNTS**

General simplification has been sought of the system. Included in this should be a unified system regarding accounts and abatements. Increasingly Slab are abating fees that previously there would be no problem with. As the LSS point out, the mailshots are getting more and more extensive. Quite often it feels like the rules are being made up as they go along. There needs to be greater clarity for the service users. We have a concern that a portion of abatements are being made simply to achieve cuts and for no other reason. We agree that solicitors should be paid for work done in this respect as well as work done to obtain vouching etc. We also agree we should be paid interest on late payments.

## **FEE INCREASES**

The GBA would wish the society to recommend and argue for increases in fees not only to the unit but also to block fees across all areas of work (civil/children's/criminal).

We would also propose that block fees have additional 'add on' fees to adequately remunerate work done. We feel there is too much emphasis on early resolution and not enough reward for involved cases. Contentious cases usually incur the most preparation. That should be valued as highly as early resolution. We propose add on fees for each adjourned diet ( to recognise the waiting/work involved for attending at numerous adjournments) ; where a special defence is intimated; where compatibility issues/ debates/prelim issues/minutes/additional procedure is required; where recovery of evidence or instruction of reports/ other defence witnesses is required. The list is not exhaustive.

We also consider that our representatives should be arguing to close the gap in remuneration between solicitors and advocates. Whilst we respect the specialism that counsel have and that enhanced rates are due, the difference in rates is not justified. The work of solicitors is as important and we would expect our representatives would agree.

## **CRIMINAL LEGAL AID**

### **Police Station Interviews and other Relevant Interviews-**

We agree that rates of remuneration require to be reconsidered in relation to police station and other similar interviews. Payment for providing such advice needs to be commensurate with the increasing importance of the role as described by Lord Carloway in his review.

A block fee would simplify the procedure however there can be large variances in the amount of time and effort involved in providing such advice and the block fee might penalise those who are required to attend personally at the interview.

It is essential that whatever the system of payment provided, there should be no means testing and question of contributions being made. It is too difficult to collect the contribution or verify the financial position of a person incarcerated and inappropriate to attempt to ascertain the detailed financial circumstances of a suspect who is in custody and likely to be held for a number of hours. On a practical basis, very few suspects are able to provide accurate information about their finances in these circumstances.

### **Summary work**

We agree that one grant of criminal legal assistance in summary cases would be appropriate and that a block fee would continue to be appropriate as long as there is an opportunity to

apply for exceptional status in any case. A block fee for pleas of guilty and not guilty with an additional suitable payment for the conducting of any length of trial diet is required.

The arbitrary distinction between cases in which the evidence takes less than 30 minutes requires to be removed when all of the other factors are taken into consideration, namely preparation, waiting, agreement of evidence. It also seems sensible that the grant remains in place until the conclusion of the case and any further procedure related to the case, such as breaches of orders and other similar proceedings.

It is also clear that there needs to be an increase in the block fee which presently exists in order to attempt to address the unfair playing field when an individual faces the full power of the state.

Increased consideration needs to be given to the granting of criminal legal assistance for cases prosecuted in the JP courts which very often involve those with no criminal convictions, for whom the consequences of a conviction are very serious and whose cases are being heard by Lay Magistrates.

### **Solemn Proceedings**

The proposed fee structure is similar to that in place at present however additional fees for early resolution are essential to ensure that there is no conflict between the accused's interests and that of his/her representative. We agree that a set of additional block fees for each diet are necessary however we disagree that these should be reducing on a sliding scale as the majority of continuations are at the request of the Crown or as a result of their actings or failures to act.

The conducting of a trial in solemn procedure requires to be remunerated on an hourly basis and the fee needs to be increased, as noted by Sheriff Principal Bowen in 2010.

### **Appeals**

We are in agreement with the proposals regarding appeals.

If the above proposals were introduced it is likely that the new system would go some way towards attempting to ensure not just access to justice in the criminal courts but would also reduce the costs involved and allow practitioners to focus on representing their clients.

## **CIVIL LEGAL AID**

### **Removal of legal aid in certain civil cases**

The GBA is opposed to this proposal. We consider that in making the proposal our representatives are encouraging the diversion of business from their members to other service providers. We have traditionally provided these services and should continue to do so. We are also concerned that the society is placing more importance on criminal business. We wonder to what extent other options have been considered which do not affect members eg removal of law centres or asking to wage cuts within SLAB at managerial/ chief executive level.

### **Civil Legal Assistance**

At page 37 and at various points thereafter, there is a clear suggestion that there should be a reduction in civil cases dealt with under legal assistance on the basis that appropriate advice will be provided from a range of alternative providers. In short, this will result in a loss of business for solicitors.

At present in practice law centres and the like refer clients to solicitors to progress cases as they are not suitably qualified/experienced to do so themselves. We cannot see that there will be a surge of funding to these organisations to ensure that adequate training is provided. It may therefore cost more money in the long term as public funding will be provided to advice centres and thereafter legal aid will be required to progress the cases which advice centres have not been able to progress.

This seems pointless and should be resisted; particularly due to having to divert clients to alternative providers.

We have the following particular concerns about the categories that they suggest are removed which may result in the most needy being unrepresented:

1. *'breach of contract'*. We are concerned this is too broad a category. There are cases that would fall within this category where the sums involved may not appear significant to some however are significant to the vulnerable on low income. Some elements of breach of contract include very complex areas of law and should not be dealt with by alternative service providers or necessarily on a private paying basis.
2. *'debt'*. We are concerned that a significant number of those in debt are amongst the most needy. CAB can only assist to a point and usually only deal with repayment negotiations. Alternative providers may not be in a position to litigate.



3. *'financial only divorce'*. These can be extremely complex cases necessitating representation. Parties with limited means may own a matrimonial home and little else and require free assistance. There are far too many complex aspects to financial provision to remove it as a category code. The application of section 9 of the Family Law (Scotland) Act 1985 can be difficult. There are a number of family cases which are sanctioned as suitable for the appointment of counsel. There are a number of experts often required, such as actuaries and accountants (for complex pension and business valuations). In addition, in the event of a recovery there will be little or no claim on the fund.
4. *'Housing/heritable property'*. There are various legal requirements that predicate actions of this nature that require a solicitor to ensure that there is pre-action compliance by lenders and correct service of papers in both landlord and tenant cases and repossession cases. Again these actions usually involve the most vulnerable in society.
5. *'personal injury'*. Consideration must be given to the fact that in non-medical negligence cases there can be complex issues relating to liability and subrogation. In cases that don't settle extra-judicially, there are complex and lengthy arguments in relation to expenses taking place after tenders are lodged on a weekly basis in the ordinary court. In addition, there are damaging consequences arising out of failure to comply with the rules. Further, we are not convinced that removal of this category would effect savings. The majority of these cases settle extra judicially with no need to make a claim on the fund. The remaining, having satisfied the reasonableness test for legal aid, have merited litigation. Again we are concerned that our representatives are suggesting the diversion of business from its members to other service providers.

*Means testing in Adults with incapacity cases.* We have conflicting views on this. We agree in principle that where there is a financial element to the case then to achieve uniformity it may make sense. It would, of course, have to be the Adult's resources which are taken into account as applications under the Adults with Incapacity (Scotland) 2000 Act are for the benefit of the Adult. Presently, if there is an application for financial only, it is means tested, however, if there is a welfare component, it is non-means tested. That doesn't really make sense so introducing means testing for applications with a financial element probably does make more sense. There is a practical difficulty here too, however. Often the applicant is not aware of or not able to access the adult's resources until they are able to obtain an order from the court.

### **Single continuing grant**

We have no difficulty with the idea of one continuing grant however would resist the notion of cost limits. We feel the proposal fails to take into account the varied work conducted under the current A&A scheme. Some files can have minimum work, others, eg medical negligence would involve the instruction of expensive expert reports, perusals of extensive medical records and may involve detailed consultations and extensive negotiations. Costs for cases should be determined based on the work required, not on the category code. A number of different types of civil case require significant pre-court expenditure, such as survey reports, medical reports and pension valuations. The outlays in such cases, let alone the actual fees, can be in excess of £1,000. What the Board will need to consider is that, in many cases, the point of pre-litigation expenditure is to exhaust all possible attempts at resolution and avoid the requirement to raise court proceedings if possible. If a cost limit is imposed, the result may be that actions are been raised prematurely or unnecessarily. We are also uncertain that it would actually achieve the desired cut in bureaucracy as we imagine the same monitoring, reporting and requiring to request increase in cover would apply as does just now. That being said, any simplification is welcomed.

We have no difficulty with the idea of a single eligibility test. This is welcome so long as it takes into account an applicant's outgoings which current A&A does not do. We note however that the society propose to 'reduce the number of people eligible' and suggest the financial element should be set between the current levels for A&A and legal aid. We are not sure upon which data this level is suggested. We do consider that a unified approach is required throughout criminal; civil and children's grants as a matter of fairness.

### **Reduction of eligibility threshold**

The limits were increased not so long ago to widen availability to take into account the impact of the financial climate on persons who hitherto may have been able to afford private representation. It is concerning that the intention is to 'considerably reduce the number of people eligible for legal assistance' which translates as reducing the number of people having access to justice. It is stated that '[o]nly those most in need, who would be unable to realistically obtain legal assistance at a private rate should qualify for publicly funded legal assistance.' In practice, this may result in solicitors having to reduce their private rates to ensure clients have access to justice or send them elsewhere to solicitor who will charge less. There are countless situations in which clients opt not to proceed under their grant of legal aid on the basis that they cannot afford their contribution so it is less likely that those same applicants will be prepared to pay on a private basis. Solicitors cannot be expected to arrange speculative fee agreements in actions such as family actions which can take some years to conclude with numerous outlays being expended throughout the conduct of the

case. Likewise, solicitors cannot be expected to defer payment of fees in similar cases. A significant consideration must be given to awards of expenses, in that, those no longer eligible for legal aid will no longer be afforded any protection against expenses under the present legislation (section 19 of the Legal Aid (Scotland) Act 1986).

### **Subject matter of dispute**

We consider the proposal is too general in its present form and elaboration is required. Currently we do not understand the reasoning behind this other than to find another avenue to considerably reduce the number of people eligible for legal assistance. In a family case, it may be that matrimonial property is taken into account at the outset thus resulting in an applicant being ineligible for legal assistance (whereas, had it not been taken into account, they would be eligible). At conclusion of the case, it may be that the applicant is not entitled to the matrimonial property that was taken into account and so have been deprived of legal assistance without obtaining benefit of that matrimonial property.

### **Legal assistance loans**

We have no objection to the idea in principal provided threshold limits are appropriate and that they were not contributing to increasing debt for the vulnerable. We have concerns however that this would involve a whole new branch within Slab and the associated administration costs would no doubt be expected to be met within the ever reducing budget. There would need to be budget increases to meet this proposal.

### **CHILDREN'S LEGAL AID**

Practically nothing has been said about this. We consider that there is room for improvement in this area. For example, we consider that an argument can be made for the automatic grant of legal aid for first appearance at CPOs and ICSOs/place of safety warrants, similar to that provided for in a petition appearance or the domestic abuse court.; further an increase in the unit and bringing ABWOR rates in line with full legal aid rates.

The online system is quite complex with lots of different forms and duplication in form filling for special urgency procedures. If the system is to change to a single application here too then that would simplify matters.

## JOHN PRYDE

When I first started in practice there were two rates of fees for criminal work, one for chamber work and one for court work. Waiting time at court was charged at the same rate as chamber work. Phone calls, copying and perusals had a specific rate. The hourly rates were the same for solemn and summary. We were paid a reasonable rate for the work which we did. The accounts dept at the Law Society (later taken over by SLAB) abated accounts if they thought charges were unreasonable. The cost of administering legal aid was a fraction of what it is now. The legal aid regulations were straightforward and could be easily understood by everyone.

What we have now is a very inefficient system run by a dysfunctional bureaucracy which appears to specialize in creating increasingly complex and unnecessary regulations. Because SLAB is run by accountants and not lawyers the primary interest is the cost rather than the quality of the legal services provided and this gives rise to conflict. SLAB has also given themselves additional work and expense by the introduction of the Public Defence Solicitors Office. Of course it is in the personal interests of those running SLAB to expand their empire with the resulting increase in costs with a corresponding decrease in funds available to pay solicitors for the services which they provide.

Unless we can reintroduce a system which is easily understood, easily administered and fair to all the parties then legal aid is doomed. Tinkering around with the current set up is not the answer.

No doubt you have heard all this before but I feel it is necessary to repeat.



## JOHN QUINN

Re proposed adults with incapacity civil legal aid changes -

As there is never any "recovery" of monies, advice and assistance accounts should be paid when civil legal aid certificate is granted.

As guardianship orders take 6-9 months to be finalised, stage payments should be authorised after 5 months from issue of civil certificate, not 12 months.

Law Society should be much more pro-active in representing solicitors who are being penalised as a result of Board's new abatement policies since November 2013. I feel I am on my own in questioning the Board's new policy.

Re proposal of means testing of civil legal aid applications, what has changed apart from banking crisis and supposed need "save money" - means testing will increase expenditure in other areas eg nursing home fees not being paid due to relatives reluctance to seek guardianship orders (as was the case before the 2006 changes) (clients who are not well off did not want incur legal fees they might not recover from adult's estate, and if there is a proof, might have legal costs awarded against them) to eg allow family home to be sold / access adult's savings, to pay care home costs, then empty home losing value and eventually council appointing selves as welfare guardian and solicitor/accountant on their approved list as financial guardians both at several times the cost to council, rather than the present system when relatives do nearly all work for nothing, which they are always willing to do.

Means testing will lose much more money to public purse than it will "save".



## JOURNAL OF THE LAW SOCIETY OF SCOTLAND

It takes an unusual turn of events for the Scottish Government to be claiming to uphold the broad availability of legal aid against cuts proposed by the Law Society of Scotland. But that is what happened in the wake of the discussion paper issued by the Society last month, <*Legal Assistance in Scotland: Fit for the 21st century*>. How did this come about, and is the charge accurate?

Solicitors are not heard praising the level of legal aid fees in Scotland. While the Government has refused to countenance the Westminster approach of withdrawing legal aid from large areas of civil work, successive restrictions have resulted in a 2014-15 budget of £132.1 million – the same as the amount spent in 1994-95, but in real terms worth only 57.6% of that. The former Cabinet Secretary for Justice, Kenny MacAskill, repeatedly insisted that there was no more money available, and it is unlikely that Michael Matheson, his successor, will take a different line. What the Society's paper therefore seeks, in essence, is to make the most efficient use of the money provided.

Setting the scene for its proposals, it describes the structure that has evolved since 1986 as "a complex system that lacks clarity and is administratively burdensome". The accounting process is too complex and time consuming, and solicitors cannot even be confident of receiving fair payment for work undertaken in good faith, giving rise to regular disputes and inconsistent outcomes. Neither criminal nor civil provision is structured to ensure the swift delivery of justice, nor has it kept pace with developments in legislation and the common law.

### **Criminal incentive**

Starting with criminal provision, the approach put forward is that instead of separate categories of criminal advice and assistance, "criminal ABWOR", and summary and solemn legal aid, there would be a single criminal legal assistance certificate, with financial verification at initial application stage only – eligibility criteria to be further discussed – and block fee systems for both summary and solemn work, except that trials would be separately chargeable by time. There would be no means test for anyone detained in a police environment.

The paper suggests that summary legal aid can be easier to obtain than ABWOR, providing an incentive to plead not guilty. Ian Moir, the Society's criminal legal aid convener, argues that this hinders the efficient operation of the justice system, for which the thrust of recent reforms has been "to get information to the relevant people to try in appropriate cases to have the case resolved as early as it can be".

Solicitor advocate Liam Ewing questions the paper's approach. "The suggestion that the current system provides an incentive for not guilty pleas is followed by the proposal to front load the fee structure – which is in effect an incentive to plead guilty, by the same logic", he told the Journal. "I can see why the Government should be attracted by this, but why should lawyers seek such an outcome?"

But according to Moir, "We're just reiterating that we want to see that there isn't a disincentive to resolve cases early." Accepting that striking the right balance is difficult, he adds: "No system is ever perfect. There have been substantial savings since they brought in ABWOR, but the difficulty is people tell you they have done a plea that falls within the scheme but then the Board take a different view, so there needs to be a clarity and a confidence that when you do the work in good faith, you know you are going to be paid."

### **Civil controversy**

It is the civil legal aid proposals, however, that principally attracted criticism – as the authors rather expected. As civil legal aid convener Mark Thorley told the Journal, "There wasn't consensus about what we were putting into print here, so we always knew it was unlikely we were going to reach consensus in the wider profession."

A parallel streamlining to that envisaged for criminal, with a single continuing certificate (renewable at key stages if a matter progresses from advice to litigation), is put forward in place of the dual advice and assistance/civil legal aid schemes; and revised eligibility limits would remove from the scope of legal aid those whose assessed contribution is so high that they may not benefit at all. Further, and here is the rub, the paper suggests that certain areas of work could be considered for removal from the scope of civil legal assistance – contingent on "there being a properly funded and widely available advice network, separate to the traditional network of firms of solicitors providing pro bono and legal assistance work".

Types of work earmarked in this way are:

- breach of contract;
- debt;
- employment law;
- financial only divorce;
- housing/heritable property; and
- personal injury (except medical negligence).

Why? "We believe", the paper states, "that the types of issues that would be removed from legal assistance by excluding the suggested areas are such that could easily and properly be provided either by the advice sector or on a private client basis through a range of funding options including speculative fee agreements, loans for legal services, and payment plans involving deferral or instalments."

It emphasises that if this course is taken, "it is critical that the organisations that currently provide high quality specialist advice in many of these areas... are able to continue to provide such advice with the confidence of secure and adequate funding".

### **Law centres: most to lose?**

But law centres are one of the types of bodies the paper principally has in mind as continuing sources of advice. Law centres rely heavily on legal aid fees as a source of income. And it is the law centres that were quickest to raise their voices in protest.

"Thousands of people depend on legal aid to compensate them when they suffer injuries, when they are threatened with eviction for rent or mortgage arrears, when they are homeless, where they are unlawfully dismissed or discriminated against", Paul Brown of Legal Services Agency wrote in the press. "The drafters of the report seem comfortable that their proposals would result in the collapse of access to core areas of civil justice for the most vulnerable in our society. They need the specialist skills of legal aid lawyers."

In similar vein, Mike Dailly of Govan Law Centre, speaking for the Scottish Association of Law Centres, wrote: "In our view and experience, this is a socially regressive proposal that would penalise the most vulnerable and disadvantaged people in our society, taking Scotland backwards in time by more than half a century, to a pre-1950 era when there was no civil legal aid."

Both called for the "divisive" and "ill-considered" paper to be withdrawn.

Before going further, it should be highlighted that on one crucial point the paper has left itself open to different interpretations. Moir and Thorley confirmed to the Journal that the civil and criminal teams worked separately on their proposals. Yet their paper is being read in several quarters as proposing to increase criminal fees at the expense of civil legal aid – including by the then Justice Secretary Kenny MacAskill, replying to a parliamentary question to similar effect from his backbench colleague Roderick Campbell, advocate. If the Society is to achieve feedback based on a proper understanding of its proposals, it is time to make its intended meaning clear.

Brown notes a lack of clarity about what would replace civil legal aid in the areas under threat. However he is in no doubt that the effect on law centres would be highly adverse. "We provide advice, assistance and representation to hundreds, if not thousands, of individuals a year in housing matters. This includes defended eviction for rent arrears, defended mortgage repossessions and homelessness cases. These cases are generally complex and contentious. If we didn't get legal aid, we would need exactly the same amount of money from other sources."

Areas such as housing, employment and reparation, he adds, need to be seen as mainstream for solicitors' involvement. "The flexibility and independence provided by civil legal aid makes this possible." And while the paper duly recognises that professional assistance may be necessary in order to protect article 6 ECHR rights, Brown maintains that: "These areas of law will only develop and the article 6 rights of the citizens concerned be protected if solicitors continue to be involved."

### **Reinvestment strategy**

Thorley agrees that special funding measures would be needed for law centres to continue to deal with these cases, but insists that the purpose of the exercise is not to save the Government money.

"What we're trying to do is to reinvest in the system. At the present it is difficult to see, certainly in terms of advice and assistance, how this is sustainable in the long term for solicitors. But at the same time there aren't large sums of money there for reinvestment, so

we have to look at it with a bit of blue sky thinking about how we can generate the reinvestment to ensure that the system survives in the future.”

So the money being ploughed back would not necessarily be reflected in solicitors' fees?

“I think that would be the ultimate goal, to make sure that solicitors are paid at a proper rate for the work that they do. Because at the moment the rate for advice and assistance hasn't changed in decades and I cannot see how it can survive in the long term based on its current rates.”

Denying that the most needy would be hit, he adds: “What we are saying is that there should be other places you can go for the type of advice that you need, without it having to be solicitor led. There may be some cases that need to be solicitor led and we would want to make sure that that happened, but in general there may be places that people can go to get this legal advice without it having to be dealt with under advice and assistance.”

The paper does not attempt to project the level of savings – and reinvestment – that might be achieved. Asked if the Society has the necessary information to ensure that money saved is actually ploughed back, Thorley replies: “It's a very difficult costing exercise, all of this. We are tentatively putting some figures together to see what it may be possible to save. It was very much an idea about how we can move forward, where we can move forward; there are no hard and fast figures... What we do know is we think it is unsustainable at the moment.”

Brown is unconvinced on this last point. “Unless a policy decision is taken that advice and assistance rates are not increased ever, then I can see no reason why advice and assistance should not be sustainable in the long term”, he asserts.

Ewing, who practises in both civil and criminal cases, similarly has a basic objection to the line taken. “The test for any legal aid reform should be whether it increases access to justice”, he states. “This proposal is little more than special pleading dressed up as reform.

“In an era of austerity welfare cuts and declining living standards, is the Society seriously suggesting that in housing and debt actions the poor should not have lawyers? I simply cannot accept that as a matter of principle and I am disappointed, to say the least, that the Society would countenance it.”

### **Political appeal**

Both raise a wider point about whether the Society has gone the right way about winning public support.

“The approach currently taken by the Society would appear to me to be unlikely to garner support from many people at all”, Brown claims. “The case for change to criminal legal aid is not properly set out in the paper, and in mooted major cuts it reduces any support that people may be prepared to give.”

Ewing puts it this way: “The politics of the proposal are awful. They split the profession on the key issue of access to justice. As someone with experience of lobbying politicians, I can assure you that those who act for poor people fighting eviction will receive a much more sympathetic hearing than the criminal bar. Finally, I feel the most pernicious aspect is that it



concedes the fundamental principle of the general availability of legal aid. As events south of the border illustrate, once that is surrendered there's no knowing where we might end up."

The paper is expressly labelled as for discussion, and it attempts to reassure readers of its commitment to ensuring that no deserving individual is left without proper advice. But it has left a hostage to fortune through its proposed reshaping of the civil system, one that may prevent proper attention being given to the document as a whole.



IAN SMITH

My immediate thought is that it is not an easy task but wonder if it is being made harder by looking at both criminal and civil together. Supportive either way.

## LAW SOCIETY COMMITTEES

### ADMINISTRATIVE JUSTICE

The committee suggests that many of the proposals contained within the paper themselves create access to justice issues, which is of great concern to the committee.

The committee recognises that resources in this area are limited and are unlikely to be the subject of significant expansion. However the committee felt that at some point it will be necessary to consider the overall impact of an effective limitation in legal assistance to the court system to the exclusion of sometimes vital issues which are dealt with by tribunals.

The committee suggests that further in-depth consideration, research and analysis needs to be given to the discussion paper's proposals to avoid further constraining those who already find justice difficult to access because of reduced means. The committee was also concerned that the discussion paper pays little, if any, regard to the issues around legal aid for cases within the administrative justice system, which include social security claimants, asylum seekers and mental health patients, who represent some of the most vulnerable people in society. The discussion paper also fails to discuss and acknowledge the potential benefits of good early legal advice and information, for example, in social security benefits, which can serve to obviate the need for an appeal to the tribunal.

The paper suggests that an option may be 'legal advice loans'. This may be suitable for those in the mid earning bracket, but will likely be unaffordable to those on limited income and means. Presumably there would need to be an affordability and credit check. Who would be responsible for carrying these out, and what if an applicant fails? This would then effectively restrict, or even prevent, accessing legal advice and (or) representation.

The paper further suggests that 'voluntary organisations' take on more responsibility to provide advice / representation as it is recognised some already do so. Many of these organisations are already under considerable funding and resource pressure. From where is it proposed the additional funding and resources come from?

The committee's view is that the discussion paper appears to suggest that the Society is effectively turning its back on the legal needs of many and further restricting access to justice, and in particular to a number of areas / sectors which do not fall within the ambit of traditional legal work. Again, the committee would cite the needs of social security claimants, especially at a time when welfare reform changes are creating greater hardship for many and recent changes in appeal rights are delaying cases getting to a tribunal, and thereby, creating a barrier to access to justice.

The committee suggests that rather than making across-the-board proposals to reduce legal aid, the Society press the case for legal assistance to apply in more areas of administrative justice, bearing in mind that early access to good quality advice and information can often help to avoid legal disputes arising in the first place.

The proposals in the discussion paper also need to be considered in conjunction with other changes that are taking place with administrative justice, such as the introduction of fees for

employment tribunals. There is evidence emerging in published statistical figures that the imposition of a fee for making an initial application to the tribunal followed by a further fee for an oral hearing is acting as an apparent deterrent, discouraging people, some of whom may have had a strong case, from bringing forward an application to the tribunal. Access to some initial legal advice and information might be helpful to distinguish such cases, thereby enabling applicants to proceed with some degree of confidence.

One additional concern the committee wish to express is that the Discussion paper has been published without any engagement with, it would appear, any other committees of the Society. The committee suggests that it would have been more appropriate to determine the whole of the Society's position before consulting rather than going out to the public domain with a Legal Aid Committee paper.

The committee suggests that, before a position paper is published, there must be more engagement with all of the Society's committees and sub-committees.

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## EQUALITY AND DIVERSITY

### Key issues

- Reforms must ensure real and practical access to justice, and not just focus on funding for lawyers
- Future discussion in policy papers on these issues may benefit from clearly setting out 'overarching principles' in terms of the Society's position on what access to justice is, and how proposals will achieve that
- An Equality Impact Assessment, must be done, informed by this stage of discussion, and should be published. Involvement of service providers and service users to assess impact will be important, with a particular focus on protected characteristics, those covered by the wider Scotland Act definition of equality, and in relation to Human Rights.
- Any proposal to increase the eligibility threshold would be of concern/need significant justification, as this could narrow access particularly in relation to certain groups.
- No proposal should be made to disregard the subject matter of the dispute, as this undoubtedly limit access for certain groups and on certain equality related issues.
- No proposal should be made to limit scope in civil matters, as the experience from England and Wales indicates this will impact on various groups disproportionality and with real consequence, with the possibility that once removed something would never be able to go back in.
- In particular, limitations in relation to employment/discrimination may have Human Rights issues, and were seen as unacceptable. A positive suggestion was that as the current Scottish Government have been vocal on employment/equality issues there may be an opportunity to encourage funding here.



- In particular, there may be an impact disabled people due to both areas of law which could be affected by a change to scope (employment, housing, debt) and the link to low incomes. There is a particular link between mental health and the need for debt advice which should be considered. Proposals around Adults with Incapacity, and automatic eligibility are of concern/would need significant justification.
- There is lack of detail on how the role of advice agencies/Law Centres would replace limitations of scope/eligibility, and a concern this would not work in practice/provide access to justice (combinations of: funding, expertise, level of demand/capacity, waiting lists, lack of expertise, geographic spread of provision, etc.)
- Many Law Centres depend on Legal Aid to survive, and so their core service would be jeopardised in key areas by these changes. Grant or block funding to advice centres/Law Centres from government may impact on their independence (through conditions attached, retendering, etc) in a way that legal aid funding does not.
- Further empirical research would be needed on the costing, viability and equality issue relating to any proposed alternative to the current position.
- Other funding options may not be suitable for many on low incomes (availability of loans) or in some areas (where a client is trying to address existing debt), with some feeling loans were not appropriate at all in any circumstance. There was concern from one person that these funding options may undermine independent advice solely in the clients' interests.
- There was a view that the Society, in its public interest role, should defend budgets and encourage funding for access to justice, especially in relation to those with protected characteristics, those covered by the wider Scotland Act definition of equality, related equality issues, and in relation to Human Rights.
- Access to justice and legal aid funding is there to help citizens and achieve outcomes, and options should be considered for reducing bureaucracy to ensure money is spent on frontline services.
- Proposals for a single point of eligibility assessment would be of concern/need significant justification, particularly in relation to protected characteristics such as disability and pregnancy/maternity, examples of where financial status, linked to equality, can change/evolve over time which would be missed by a single assessment point.

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## EQUALITIES LAW

On the (abwor) legal aid in Employment Tribunals issue it may of course be argued by some in our society that there is no benefit in employees (as opposed to comparatively well-resourced employers) engaging solicitors as their claims are so straightforward they can simply self-represent.

The committee consider that the Law Society of Scotland would support the traditional Scottish approach that equality of arms is of importance.

Historically it can be said that in *Gerrie -v- Ministry of Defence S/100842/99* the Chair Mr Watt on the specific facts considered lack of legal aid for representation did not breach Article 6 as the case was limited to Unfair Dismissal and there was limited aid (Advice & Assistance which could provide limited assist in preparation) the case was appealed to the Employment Appeal Tribunal (in absence of a technical devolution remit to Inner House) with a hearing originally scheduled in early 2000 but was subsequently scheduled for poss around Dec 2000, the appeal however did not proceed as matters were resolved and the then Scottish Exec intervened to head off the technical wider challenge by opening up ABWOR to Employment Tribunals given their role in adjudicating rights.

Article 6 of course provides that:

*"In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

Subsequent to arguments in *Gerrie* we have the Charter of EU rights Article 47(3) CFR which specifies a right to legal aid in the vindication of rights protected under EU law covering most all employment discrimination law, TUPE claims, working time etc.

Article 47 of the Charter provides:-

*"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*

*Everyone shall have the possibility of being advised, defended and represented .*

*Legal Aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".*

The application in the UK of the Charter itself has of course been useful explored in *R v Sec of State for the Home Department [2013] EWHC 3453 (Admin)*.

*"12. Although the language of this protocol reveals a certain amount of political haggling, to my mind it is absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our domestic courts. The assertion in the sixth recital of the protocol that no new rights are created seems to me to be a misleading product of political compromise because on any view the Charter enunciates a host of new rights which are not expressly found in the European Convention on Human Rights signed in Rome in 1950." (emphasis added).*

It is considered that the Scottish Government's position regarding the application of the Charter would significantly diverge from that of the present Westminster Government.



On the basis of Articles 6 of EU Convention of HR and Article 47(2) of the Charter, the committee would strongly caution against removal of the existing legal aid given the likelihood of a successful challenge notwithstanding the opportunities provided by the Settlement Paper (Clause 25 ) in relation to delivery of access to Employment Rights in Scotland and while noting that it provides that the powers "*may be subject to specific constraints and requirements*" to "*ensure the continuing effective delivery of the overarching national policy*", there is nothing which would prevent a bold re-imaging of the Employment Tribunals into an Employment and Equality Court as our 3 specialist Scottish Court in Court to compliment the new planned Energy and Natural Resources Court in the Court of Session and the PI Specialist Court, moving our existing ET Judges (and President) into the Civil Court System as a Specialist Employment and Equality Civil Court retaining and indeed re-establishing the existing lay panel input to supplement the Judicial decision making and flexibility of process and which would be able to deal with all aspects of employment law and include all breach of contracts (certain value of traditional breach of contract are excluded of course from ET), matters relating to Industrial actions (interdicts are at present dealt with by civil court judges who have no experience of the industrial matters) restrictive covenants and extend to include goods and services issues against the background of the merger of the Scottish Civil System and Scottish Tribunal Service.

This would of course build on the considerable expertise of existing ET judges while providing actual access to justice within the civil court area, with for instance a Specialist Employment and Equality Court having a small claims procedure classically for "end of employment" limited value wages disputes and generally otherwise with all the checks and balances which have built up and indeed provision for class actions for democratic representative bodies such as Trade Unions for breach of contract matters such as equal pay and holiday pay.

## LAW SOCIETY OF SCOTLAND DISCUSSION EVENT

### Note of Discussion Event

#### Legal Aid – Fit for the 21<sup>st</sup> Century

**3 December 2014, 18.00**

Attendees included a wide range of stakeholders, including representatives from advice sector agencies, law centres, solicitors, and third sector organisations. Representatives from SLAB and the Scottish Government were present as observers.

#### Comments:

- Asking rhetorical questions in relation to policy issues is a dangerous approach.
- It is strange for the Law Society to be questioning whether we need lawyers.
- We do need lawyers. Human rights compliance has a cost. Lawyers are a necessary part of this. Human rights challenges are not efficient, but are important.
- The legal profession is key in developing and understanding the law, and developing practice. If there is no legal aid, this will not happen. Important test cases are funded by legal aid.
- If these proposals are just for discussion, what does the Law Society actually want to say?
- The scope proposals should be withdrawn, just keep the serious proposals for discussion.
- A private solicitor cannot do housing law anymore because of SLAB – it cannot be done at a loss. So, this work goes to law centres that do it very well. It is not funded in a way that allows private solicitors to do it.
- The current legal aid system is not working, it is not fit for purpose.
- Scotland has one of the highest spending and best legal aid systems in the world. There are problems, but it is fit for purpose. Throughout the world, no legal profession has voluntarily proposed cuts to scope for legal aid. The system can be improved, but need to be very careful in saying the profession is not committed to wide scope and eligibility.
- The Law Society should not be accepting the need for cuts. It should be highlighting the ways that cuts are already damaging access to justice. The proposals are instigating the wrong discussion.



- The current system is in shambles and needs reform. Agree there is a need for simplification, but the real issue is funding. It is dangerous to concede that we cannot influence the budget. The Law Society keeps saying that savings need to be reinvested, but this never happens. Why propose savings when we won't get them back?
- Human rights compliance means that we need legal aid for judicial reviews.
- Rates need to be increased, we need to have that debate and influence public opinion. This paper has the opposite effect. The criminal part is well thought out, and fine. The civil part is not well thought out or argued, and should be withdrawn.
- People will not start paying privately if legal aid is removed.
- Arguing against cuts to scope does not mean that we should not encourage other options, such as trade union membership.
- Need to be careful about converting legal aid to advice agencies. These organisations cannot provide the same type of representation in courts and tribunals as a solicitor can. Solicitors should work in partnership with advice agencies, but should not just hand off these areas. Early intervention and advice is good, but sometimes people need a solicitor. Advice agencies do not have the time, resources or expertise.
- Employment cases are currently referred from advice agencies and the CLAO to private solicitors.
- Accept that there are problems in the legal aid system, and want to make things better, but the paper makes things worse. The paper lacks principles, evidence, and balance. It seems self-serving. We need to look at what is good for clients, not just lawyers.
- Taking areas out of legal aid would be catastrophic for advice agencies. There is no way they could cope with the amount that would come at them. Lawyers pulling back from welfare law lead to the overwhelming of advice agencies with this work, meaning that they have had to give up other specialised types of work, such as employment law. Just because advice is provided through advice agencies doesn't mean it is free, there is still a cost to this.
- Asking people to pay leads to people thinking very hard about whether to take action. This has been seen with the introduction of fees for employment tribunals.



- The paper lacks consideration of the wider civil justice system policy landscape and reforms.
- People deserve quality representation, and should not be handed off to non-specialist advisors. This will affect individuals, especially those struggling already. Reforms should improve the system, and improve access to justice, not create financial barriers for individuals.
- Over the past 25 years the system has become increasingly complex. There is nothing wrong with looking at simplification, but should not suggest cutting scope.
- Improvements to the merits test meaning that each cases was assessed on its own merits would be a better option rather than cutting scope.

## LAW SOCIETY OF SCOTLAND: CRIMINAL LEGAL AID PRACTITIONERS FORUM

### Legal Aid Discussion Paper

The Discussion Paper was discussed and there was broad support for the criminal proposals.

It was agreed:

- The legal aid system is overly complex and in need of simplification
- SLAB uses complications of the existing system to their advantage
- Simplification should save administration costs for SLAB and savings should be re-invested into the legal aid fund
- A block fee for police station work should be introduced but the fee needs to be high enough to reflect the work carried out
- At present solicitors do not apply for exceptional case status because the rates of remuneration mean that it is not worth the time and effort in applying
- The Law Society should continue to press SLAB to make savings in expert rates

### The Suggestion of a Building Block System

Outlined that the structure of a block system for solemn could be as follows:

- S.76 hearing - block fee paid to the solicitor
- Settlement at Preliminary Hearing – different level of block fee paid to the solicitor
- Further Preliminary Hearings – different level of block fees paid to the solicitor for each of these hearings

The fee for settlement at a first or second hearing could be a lesser sum.

If a trial is fixed, there would be no block fee for the solicitor and the solicitor would be paid on a time-based system (e.g. a daily rate). The blocks for perusals and consultations would then be added on top of the time-based system for trial.

It was agreed that there has to be fair remuneration. The blocks would have to be attractive enough to justify moving away from the present system.

It was queried how there could be a block fee which is large enough to deal with post-conviction cases such as proceeds of crime. Agreed that perusal blocks would have to be in addition to this block (a building block system would mean that blocks accrue to the case).

### Concerns and Issues

The following points and concerns were raised:

- A lot of good work going into the project but it might be a wasted effort if there is no appetite from the Government to implement final recommendations
- There is a risk SLAB and Government produce blocks that are too small



- There is also a risk that SLAB takes the opportunity to use a block system to pay as little as possible for waiting times, perusals and/or consultations
- There is also a risk that SLAB adopts the solicitor advocate system so that the solicitor does not get the fee for the first 500 or 1000 sheets of perusals
- The drive to ensure early resolution will only work if disclosure issues are resolved – require COPFS support
- A difficulty with a block fee system generally is that the lawyer who works hard on a case gets paid the same as the lawyer who does very little (though noted that the solicitor at trial will still get more funding)
- Regarding delay there are difficulties regarding court scheduling which cannot be addressed through legal assistance
- The introduction of a police station block fee requires additional funding (noted that the Government had allocated additional funding through the Criminal Justice Bill)

### **Waiting Times, Perusals and Consultations**

It was noted solicitors do need to be properly paid for this work.

It was suggested that the problems regarding waiting times are caused by the system itself rather than by legal assistance arrangements (solicitors have no control over when the case is to be called).

It was agreed there could be a block fee for every 500 sheets and then a block for every 1500 sheets on top of those.

### **Block Fee for Consultation**

The level of the block fee would have to be high enough to take into account the time needed to properly consult with the client. The block consultation fee would have to vary depending on the stage of the case (e.g. the s.76 consultation would require less time than consultation for trial).

### **Funding**

It was explained that the criminal proposals in the discussion paper are NOT designed to make savings in legal assistance but to make savings in the wider justice budget.



## LIAM ROBERTSON

the big picture should be addressed as far as resolution of a plea is concerned  
sec 76 plea would be beneficial to all and the witness expenses incurred would be eradicated  
plus client would get the benefit of an early plea to the charge

## MARCUS BROWN

I have worked as a full time defence precognition officer for twenty five years now, specialising in solemn criminal work. I worked in house for a very large criminal legal aid firm in Central Scotland for ten years during the 1990s and have worked on an independent freelance basis for fifteen years now.

I read your discussion paper with some interest. There are two areas that cause me some concern- the provision of fees for unqualified precognition work and the development of a fair and reasonable fee for this work.

I note that there was no mention of whether the proposed block fees would fund any defence precognition work or reasonable enquiries required as a normal part of preparation for, in most cases, solemn matters.

From experience of the introduction of summery fixed fees in 1999, my worry would be that introduction of a block fee for solemn work would finally kill off in its entirety the unique provision of defence precognition work in Scotland.

While it may be argued that crown disclosure has reduced the need for defence precognition work, the quality of information provided by the crown is very poor, highly unreliable and often very late, with solicitors regularly receiving significant and substantial disclosure from the crown in the days leading up to trial.

There is still some requirement for targeted good quality criminal precognition work for many solemn matters. Many of these cases are particularly serious, complex or may involve vulnerable witnesses. In many cases the police have taken a "sufficiency of evidence" approach, ignoring exculpatory evidence despite their duties in this area. In other cases simply obtaining good quality clear and reliable information is required.

In my own experience crown disclosure has led to significantly later instruction and a poorer quality of witness information, which makes case preparation very difficult.

Despite Scottish Government talking a good game about prioritising the quality of service to witnesses and victims of crime, I have found that the quality of support provided to witnesses and victims of crime is significantly poorer than it was twenty years ago. I am usually the only person victims and witnesses have contact with and can ask questions of, from the point when they provide a statement to the police until their attendance at court.

It could be argued that the new victim and witnesses legislation is a strong argument for the need for renewed investment in quality precognition services for witnesses.

I would suggest that the new fees must be structured in a way that allows the instructing solicitor to, confidently and without threat of abatement, instruct reasonable defence enquires at an earlier stage. This allows the solicitor time to consider a Section 76 plea or agreement of evidence and would to lead to a faster resolution of matters for all concerned.

Alternatively for cases proceeding to trial, it is clearly better for all that the solicitor is fully prepared with their own precognition complete at the Intermediate Diet/ First Diet/



Preliminary Hearing stage, where crown disclosure has failed in some way or has been significantly delayed.

The recent *Beurskens v HM Advocate* (2014) judgement may have an impact on the future of pre-trial preparations for defence solicitors and it would be foolish indeed to kill off defence precognition at this time.

I had not been aware of the separate payment arrangements for Sheriff Officers or indeed the index linked fee arrangements. Perhaps this is something that could be looked at as a possible solution for defence precognition work, ensuring that those involved are properly and fairly remunerated for work done.

Despite the Government's stated priority to improve the justice system for victims and witnesses, present fee rates suggest that Sheriff Officers who deal with paper are over four times more important than Precognition Officers who deal with people.

The unqualified time and line rate for precognition work remained more or less stationary for twenty four years up to the rate changes in 2010, when the rate was more than halved for "taking precognition statements".

Under the old rate there was scope for precognition agents to set a reasonable hourly rate for work dependant on their experience and skills. The ability to set rates was in essence removed with the implementation of the £12 per hour rate under the 2010 regulations. This rate has remained stationary for the last four and a half years, resulting in a year by year reduction in real terms.

While precognoscers have a reputation for optimism in or work, I am very much left wondering what the value of my £12 per hour might be in real terms in another twenty years time.

## NICOLE BUSBY

I welcome the opportunity to provide feedback relating to the proposals contained in the Society's recent discussion paper 'Legal Assistance in Scotland' (LAS). I read the paper with interest, particularly in light of my involvement as Co-Researcher on the research project 'Citizens Advice Bureaux and Employment Disputes' – for further information, see the project website: <http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project>.

While I welcome the Society's aim to modernise and simplify the system of civil legal assistance, I am concerned by the proposal to consider the removal of employment law from the scope of such assistance. In the following response I will set out the rationale on which my concern is based.

### **Research on CABx and Employment Disputes**

The programme of research with which I am currently engaged focuses on the perceptions and experiences of individuals with employment disputes who are advised and assisted by Citizens Advice Bureaux. The project, which is funded by the European Research Council and jointly conducted with colleagues at the University of Bristol's Law School, provides longitudinal data which tracks over 130 cases over a two-year period. Approximately 60 of those cases are Scottish in origin and all have been identified as potential Employment Tribunal claims. As our data shows, the cases result in a range of different outcomes including resolution through agreed settlement between the parties, mediation, conciliation (Acas and other) and adjudication by the Employment Tribunal as well as decisions by the potential claimants to take no further action. The overriding aim of this research is to examine how workers who cannot easily afford to pay for legal advice resolve workplace disputes, hence my particular interest in the current discussion paper.

### **Variety of Support Offered by CABx**

I agree strongly with the principle of '...a fair accessible system for civil disputes' (LAS, at p.1) and our data supports the statement regarding the impact of a lack of access to justice in areas of civil law expressed in the document's introduction (at p.1),

'Without the ability to seek resolution, civil justice issues can lead to serious impacts on mental and physical health, relationship breakdowns, and loss of income and confidence. It is essential that people who may not have the necessary financial resources, can still access legal advice and services.'

As you will be aware, fees have been payable for most claimants to the Employment Tribunal since 31st July 2013. Although the instigation of the cases featured in our research largely predate the introduction of fees, it shows that in the pre-fees era many individuals found legal advice and representation prohibitively expensive and were thus reliant on the support available through local Citizens Advice Bureaux (CABx). The growing number of employment disputes being reported to CABx has substantially increased the overall workload for local bureaux placing extra strain on a service which is already under pressure to maintain coverage across a wide range of advice areas with limited resources. The overall effect is that specialist employment advice is not always available and, where it is provided, it is done so

under a number of different arrangements so that the service offered varies from one bureau to another with most unable to offer representation at Tribunal. Nevertheless, the CABx provide an undoubtedly valuable service to many individuals who lack the financial resources to pay for legal advice and representation and who do not have any other available means of support. Such individuals often find the whole process of seeking to resolve an employment dispute extremely difficult for a variety of reasons including, but not restricted to, financial hardship.

### **The Impact of Employment Tribunal Fees**

As has been widely reported, the introduction of fees has had a substantial impact on the number of individuals lodging claims with the ET with official statistics recording a total reduction across all employment jurisdictions of 81% between Q4 2012-13 and Q4 2013-14. The remission system, which is intended to provide fee waivers or reductions for those individuals who are unable to pay fees, has been found to be inordinately difficult for many to navigate for a number of reasons.

The fees structure, thus, represents a significant barrier to access to justice for claimants, a view which is supported by research from various sources. Citizens Advice (the umbrella organisation in England and Wales) has reported that the imposition of fees is putting claimants off pursuing otherwise viable claims, see further:

[http://www.citizensadvice.org.uk/index/pressoffice/press\\_index/press\\_20140727.htm](http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20140727.htm). This finding is echoed by research recently carried out in Scotland by members of my research team at Strathclyde Law School in partnership with Citizens Advice Scotland. Furthermore, The Law Society of Scotland's own report issued on the one-year anniversary of the introduction of fees (Law Society of Scotland, 'Employment Tribunal Fees', July 2014) found that fees presented '...a serious challenge to access to justice' as 'claims that would have been successful are simply not being brought as a result of this change.' The report found that,

These fees exacerbate challenges elsewhere, such as the complexity of the remission process and the likelihood of successful recovery of any award. We believe that wider consideration [should be] given to the process of resolving workplace disputes, how a tribunal service should be funded, how capacity should be managed and ultimately, how to fairly balance the system for both claimants and employers.

Given the overwhelming evidence that claimants to the ET experience particular barriers to justice, it is of crucial importance that any means of financial support currently available which is capable of alleviating the difficulties experienced by such individuals is retained. Such support should include the provision of independent legal advice and support up to and including representation at Tribunal.

### **The Removal of Employment Law from the Scope of Civil Legal Assistance**

Whilst I welcome the Society's 'key proposal for civil legal assistance' (LAS, at p.5) which would see the streamlining of such assistance with the current complex system replaced by a simpler process targeted at those most in need, I cannot reconcile the achievement of this goal with the proposals for amending its scope so as to remove employment law. This



proposal seems totally at odds with the current views of those working in the field be it as legal practitioners, advice agency advisors and researchers who, according to the findings reported above, appear to be advocating for *more* financial assistance to be made available to individuals with employment disputes as a means of enabling them to access legal services.

The statement in your report (at p. 37), that the removal of certain areas from the scope of legal assistance 'is contingent on there being a properly funded and widely available advice network, separate to the traditional network of firms of solicitors providing *pro bono* and legal assistance work' assumes that such a network exists in the field of employment law. This is an unfounded assumption as, whilst it is true that the CABx and other advice services (including the Strathclyde Student Law Clinic) do indeed have expertise in employment law, these organisations are finding it increasingly difficult to manage often meagre resources making it difficult for them to provide more than the most basic of support in many cases. The legalistic nature of employment-related litigation makes the ET an extremely difficult arena for the litigant in person to represent him or herself. Moreover, if claims to the ET continue to fall or are maintained at current numbers, it is likely that levels of expertise within the advice sector will decline with specialist employment advice becoming a thing of the past. This means that it is even more important that claimants have access to legally qualified representatives. Of course there may be many ways in which the advice sector and legal practitioners could work together to ensure a consistently high quality of service for those who are unable to pay for such support in line with the report's conclusion (LAS, p. 45),

In civil law, we believe that legal assistance could be much more focused on the areas where people may genuinely struggle to obtain a private solicitor to assist them with a case that has real merits, and suggest that there are ways in which the system could support and complement a robust advice sector and a competitive private market.

I would argue in the strongest terms that the removal of civil legal assistance from employment cases within the current context is highly likely to militate against, rather than to support, this laudable aim.

I note that your invitation for responses raises the possibility of face-to-face meetings and I would be more than happy to meet with your representatives to discuss the contents of this response by sharing our research findings.

PAUL BROWN

#### FIRST RESPONSE

Defended eviction for rent and mortgage arrears, accident claims and employment cases are among the most important in the vindication of the human rights of the most vulnerable. Legal advice and representation is fundamental. You are mooted for discussion the removal of these areas from legal aid. I am astonished... maybe a mistake has been made. I certainly hope so and look forward to confirmation by return. I have devoted my career to these areas and concerned that the professional body of which I have been a member for over thirty years appears not to recognise what I and many others do. Or indeed why we do it.

#### SECOND RESPONSE

Just a quick note to thank you for the invitation of the discussion on the future of legal aid. I, and I think everybody else, found it useful, although, of course, a lot remains to be discussed.

My view remains as it always has been: the scope of Civil Legal Aid should be protected. It is in the interests of the vulnerable and, indeed, also both solicitors and advocates.

In my view, particularly in the fields in which I and my colleagues practice, a full Civil Legal Aid system is essential if Scotland is to remain a human rights compliant society as, indeed, appears to be the concluded wish of everybody concerned.

I share concern about Advice and Assistance rates particularly and both formally and informally am very happy to join in with representations to Government that these needs to be improved.

At the appropriate point, I remain very happy to join in with discussion about how the importance of our Civil Legal Aid system can be emphasised at all relevant levels.

I hope these comments are helpful and I look forward to furthering the debate in due course.

#### THIRD RESPONSE

I thought I would contact you simply to confirm that LSA formally associates itself with the response by the Scottish Association of Law Centres.

We, like other Law Centres in Scotland, are a full member of the Scottish Association of Law Centres and thoroughly support the comments that it has made.

You will already be aware of LSA's views.

There is no harm, however, here in summarising!

We support a comprehensive legal aid system for Scotland that provides human rights protection for all Scotland's citizens.

We are not criminal lawyers and are not in a position to comment on detail concerning what reforms or changes may be needed. We do, however, vigorously assert that criminal legal



aid needs to meet the reasonable business objectives of the lawyers providing that fundamental service.

As regards civil legal aid, within a maintenance of the scope of the current system, we have no difficulties in considering ways that it may be made more effective and efficient. We also think that some of the rates for some areas of work are woefully low and need to be reviewed.

We are concerned about the way the Law Society has undertaken this consultation and look forward to engaging in a further detailed discussion within the profession, no doubt structured by the Law Society before any final view is reached.



## PAUL CRUIKSHANK

I can't remember why I wanted to study law. I know I've wanted to be a lawyer since 10 or 11, but I have never been able to remember that moment when I went, "I, Paul Cruikshank, want to put on a wig and a cape and argue why I'm right". When I qualify, I'll be the first lawyer in my extended family, so it wasn't a case of '...my father before me, his father before him...'. It just, happened. My parents don't remember either. They've not been able to point to the terrible playground injustice that ignited the fire in my belly. As unsatisfying a chapter in my memoirs that story will be, it's the truth.

But I still chose to study law come my Sixth Year at school because law was what I wanted to do...for whatever reason I wanted to do it. I figured that, since there was a reason once upon a time, I would eventually re-discover it, so it'd be fine. But being honest, I don't think I have. I don't think I did find the spark that lit the legal flame in the pre-pubescent me in the delict lectures or company law tutorials.

I suppose the reason you start doing something is less important to the reason you keep doing it. At the start of 2nd year. I started volunteering with Drumchapel Citizen's Advice Bureau, and whatever reason I had for deciding to study law, I had a reason to become a lawyer. For the first time, I experienced first-hand what I was taught in school. I saw people who had nothing and were being asked to live on less.

And then it got worse. The Under-occupancy charge (or the Bedroom Tax) was introduced, meaning people didn't receive full housing benefit if they had a 'spare room' (which wasn't always 'spare'). This meant they couldn't pay their rent since, inevitably, they had no other income, and finding one wasn't an option. The UK government introduced a manifestly unfair policy and, until very recently, the Scottish Government – while having the power to mitigate these effects – did nothing. *This* inaction led to mounting rent arrears and so eviction became a very real threat. This, I knew, was just plain wrong, and I realised that I wanted to work to make the system fair and just. I to use what I knew as a lawyer to help everyone who found themselves in these situations.

The issue is that I can't do this for free. I need money to live and, most people who have to rely on social security payments to survive are unlikely to be able to afford a lawyer. But that's why we have Legal Aid; to make sure that everyone has access to the justice system. But, like all government funded projects, Legal Aid is facing severe financial pressures. In 2011, the Scottish Government began a [review of Scottish Legal aid](#) and just this month, The Law Society of Scotland (LSoS) released its [discussion paper](#) to set out its view on how the system should change. It is deeply concerning.

The LSoS suggested in their report that:

*"...the following areas being removed from the scope of civil legal assistance:*

- Breach of contract*
- Debt*
- Employment law*
- Financial only divorce*

- Housing/heritable property
- Personal injury (with the exception of medical negligence)”

These changes would create major obstacles to the most vulnerable in our society accessing the court system and making their case effectively. Consider the case I set out above. If Civil Legal Aid wasn't available to those facing homelessness, who would be there to make their case? What about the expectant single-mother who's hours have been cut at just the right time so her employer doesn't have to pay her full Statutory Maternity Pay? Who represents her at the tribunal when she can't afford to pay, and her knowledge of the law isn't enough for her to go on? Both these cases (taken from my own experiences) would be removed from civil Legal Aid under the LSoS proposals.

According to the LSoS, these areas can be:

*“easily and properly be provided either by the advice sector or on a private client basis through a range of funding options including speculative fee agreements, loans for legal services, and payment plans involving deferral or instalments.”*

This suggestion, while theoretically viable, ignore many practical issues that make these suggestions unworkable. Foremost among these is the fact that the advice sector is already underfunded and overworked as it is. Attempting to increase the scale of its representation work could break it. The other funding options also overlook the reality that Law Centres, which provide legal assistance to the most vulnerable, are already working on a shoestring budget, and speculative fee agreements (No win, No fee) could decimate the already empty landscape.

My fear is that the LSoS proposals would make the system of access to the Civil Justice System fundamentally unfair in two ways. Directly, it would remove support to the most vulnerable, who overwhelmingly use the justice system to prevent their homelessness, protect their rights as workers and seek a fair deal with their creditors. This means that these people will be failed by our justice system and will be denied a rightfully deserved day in court. Indirectly, this proposed system would stretch already thinly-spread resources, meaning the gaping hole left by the “Legal Aid Gap” cannot be filled. Even those that try and make it smaller will struggle, because the alternative funding options just can't work in the 'free' Legal Advice sector without draining already scarce resources.

If LSoS's proposed Civil Legal Aid structure were adopted, making sure the most-disadvantaged in society could access justice would be harder than ever (and it's not a walk in the park just now). Last week, the Scottish Association of Law Centres, led by Govan Law Centre's Mike Dailly, [published their response](#) to the Discussion Paper. My concerns about the proposed system are their concerns. I'm not a solicitor yet, but I still strongly support the position the SALC takes in its letter – because we must ensure there is fair access to justice for all.

I know why I want to become a lawyer – to help those that need it and to fight for Social Justice through the legal profession. The only way to do that is to make sure that its not just those who can afford a lawyer can enforce their rights. For them, justice in enforcement of a debt. For the least well off, it may well be a matter of staving off homelessness. Unless the



future of Civil Legal Aid can be protected, the Civil Justice System in Scotland will become an unfair, unjust place for those without money – and it is the job of the profession, future lawyers (like me), and LSoS itself to make sure that doesn't happen.

PETER LOCKHART

Many thanks for your email, I have now had an opportunity to read the Discussion Paper. I believe The Law Society, and the Criminal and Civil Committees in particular, should be congratulated for this visionary document. My comments and observations relate purely to Criminal Legal Aid.

I found the section on funding illuminating. In particular, the comparison figures in real terms between 1994/95 and 2014/2015. Given there has been no rate increase in many areas for the last twenty years, it would be interesting to note whether or not the reduction, in real terms relating to Criminal Legal Aid payments to solicitors, is matched by a reduction in the cost base running the Scottish Legal Aid Board. In addition, it would be interesting to see similar figures for other Justice agencies, such as Police, COPFS and Scottish Courts. You seek comments in certain areas and I will respond to those which apply to Criminal Legal Aid.

1. **Legal assistance is overly complex inefficient, outdated and under-funded.**

I entirely agree with all that is said in the Report. There is no doubt that is true, the entire system has long been due an overhaul.

2. **There could be a single system for Criminal Legal Assistance**

I very much favour this suggestion. This has been well thought out, the arguments are cogent. My one reservation relates to the block fee system on Solemn, page 34. The suggestion is "***This sliding scale would provide a further incentive to try and resolve cases at an early stage***". I believe strongly in early resolution. However, so much depends on the Crown and their ability to disclose and engage with the defence. To my mind this is the greatest barrier to early resolution, that problem has become more acute, as cut backs have affected the COPFS. However, there are certain cases which simply cannot be resolved and will require to proceed to Trial. It would perhaps be unfortunate if the solicitor has taken steps to achieve early resolution, without success and then be penalised at a later date.

In addition, I would comment on page 36 "Exceptional Case Status". I agree with the proposition. In many ways this goes back to what you used to be called a "Section 13.2 Certificate". I wonder whether consideration should be given to exceptional case status being determined by the Court, rather than the Legal Aid Board. This could be done at the First Diet or Preliminary Hearing. The Court, at that stage, will have a much better view than SLAB, with regard to the complexity and exceptional case status. If the Court refused the



motion at that stage, the motion could be renewed at the end of proceedings. When 13.2 Certificates were considered, they were always dealt with at the conclusion of proceedings.

3. **There is a need for a block fee for Police Station advice work**

I am in agreement with this. The present rules are far too complicated and almost impossible to follow. Your Report points out the difficulty trying to chase up clients for financial information, particularly once they have been released by the Police and there may be no charges or Court appearances. The present set up is unworkable.

4. **Fees could be front loaded to encourage early resolution of criminal cases.**

As indicated above, with the reservation referred to relating to exceptional case status above, I am in agreement with the Report on this point.

5. **There should be alternative funding options and Government Loans for legal services**

I was very interested in this proposal. I believe this to be an excellent idea and one that could work, without too much bureaucracy.

Hopefully the Profession will be engage with The Society on this important discussion paper. I do hope the Profession appreciate the initiative shown by the Criminal and Civil Committees in preparing this paper.

I also hope The Legal Aid Board and Government engage in a positive way. Hopefully most of the proposals are then implemented.



## POLICE SCOTLAND

Having reviewed the discussion paper and considered the context and role of Police Scotland, it is assessed that it would be appropriate to offer a general articulation of the police service position rather than respond to the specific questions that you have raised in your communication.

Police Scotland fully recognises as a core element of the justice system the importance of appropriate legal advice being available to any person accused of a crime or offence or considering civil litigation. The associated requirement for those providing such advice to be appropriately remunerated is also fully acknowledged. The arrangements to achieve these intentions should not provide an incentive – or disincentive for an accused person, prospective litigant or their legal representatives to plead guilty or not guilty or pursue or desist from a civil legal aid action. The arrangements should, in common with any publicly funded service, represent value for money and be both effective and efficient.

## SCOTTISH ASSOCIATION OF LAW CENTRES

### FIRST RESPONSE

I write on behalf of the Scottish Association of Law Centres (SALC) in relation to your above noted discussion paper.

At page 39 of your paper you say: "We suggest that consideration should be given to the following areas being removed from the scope of civil legal assistance:

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

SALC believes that this suggestion would severely restrict access to justice for those who most need it in Scotland. In our view and experience, this is a socially regressive proposal that would penalise the most vulnerable and disadvantaged people in our society, taking Scotland backwards in time by more than half a century, to a pre-1950s era when there was no civil legal aid.

As local community law centres undertaking thousands of housing, debt, employment law, breach of contract and personal injury cases across Scotland each year, our clients rely on the availability of civil legal assistance to access justice and secure a fair resolution of legal disputes.

We do not understand why the Law Society of Scotland when charged with a statutory duty to promote the interests of the public in Scotland would suggest consideration be given to abolishing civil legal aid in vital areas of legal need. This is particularly so, when the European Convention on Human Rights guarantees a right to a fair hearing in civil matters with a right to legal representation and an equality of arms between parties.

The availability of civil legal assistance to fund solicitors to defend repossessions and evictions, tackle poor housing conditions and seek reparation for damage to health, challenge the unlawful harassment of tenants, act in complex debt and consumer credit cases, seek legal remedies for unfair dismissal of workers and tackle discrimination in the workplace, is absolutely fundamental for a fairer and more equal Scotland.

In the Scottish interest, we would ask the Law Society of Scotland to withdraw these ill-advised and ill-considered proposals.

## SECOND RESPONSE

### ***Introduction – Summary of response***

The Law Society of Scotland has published a discussion paper on Legal Aid which proposes wide ranging changes to the current system.

There are a number of flaws in the proposals in the discussion paper.

Firstly, the paper does not contain any fundamental principles upon which the Legal Aid system should be based, and against which any proposed changes might be judged. It ignores and undermines any principles which presently exist, and seeks to justify its proposals by reference only to greater simplicity and greater efficiency.

Secondly, the paper proposes to reallocate funds to Criminal Legal Aid, which already accounts for the substantial majority of Legal Aid funding, from Civil Legal Aid. It omits however to provide any evidence which might show that such a change is necessary.

Thirdly, the proposals are unbalanced. There are substantial details relating to Criminal Legal Aid, but less consideration is given to Civil Legal Aid. In particular it is proposed that social welfare law be taken out of Legal Aid provision altogether.

Fourthly, the proposals are vulnerable to the accusation that Criminal Legal Aid fees should be increased at the expense of reductions in expenditure in social welfare law. This would mean that more people would be evicted, more claimants at Employment Tribunals would be unrepresented, fewer people could pursue personal injury claims, and in general the proportion of the population being able to access justice would be substantially reduced.

Fifthly, the discussion paper does not engage with ideas for development proposed previously. These are mentioned in passing and dismissed.

Sixthly, and most bizarrely, the Law Society of Scotland, the representative body for all solicitors in Scotland, is canvassing proposals that substantially fewer people should have access to court and tribunal representation, and the Society is targeting some of the most vulnerable members of the community.

#### ***1. Lack of underpinning principles***

The Law Society paper does not acknowledge existing principles in the provision of Legal Aid, and does not develop or put forward new principles which might provide a basis for rethinking the Legal Aid system.

At the moment, Legal Aid in Scotland exists for the benefit of those members of the public who are charged with a criminal offence or engaged in a civil dispute, and who do not have the resources to fully pay for appropriate legal services. The system is demand-led and is arguably universal, covering all relevant areas of law.

Legal Aid is intended to provide access to justice for those members of the public who might need it.



The Law Society paper provides no basis in principle for the changes it proposes. The best it can do is suggest that its proposals will make Legal Aid simpler and more efficient. It is questionable however whether the specific suggestions in the paper will achieve this.

As well as failing to enunciate any principles which might justify the proposed changes, it also fails to take account of the principles which currently underpin the present Legal Aid system. It does not consider the principle of universality in regard to legal subject matter. Instead it implicitly eradicates this principle by suggesting that particular legal categories should be removed from the Legal Aid system altogether.

Little consideration is given to the principle that the Legal Aid system should be demand-led. In Civil Legal Aid, an applicant with probable cause, and who is financially eligible, should be entitled to a grant of Legal Aid to pursue or defend a claim where this is reasonable. It is estimated that 75% of the population are eligible to apply. In Criminal Legal Aid the proportion is likely to be higher. The numbers of people eligible for Advice and Assistance are likely to be of the same order. Successive governments in Scotland have supported this principle. Until now no one has sought to challenge it. In our view the representative body of Scottish solicitors should be doing what it can to maintain this principle, instead of pioneering ways to exclude sections of the public from the justice system.

The paper does not mention the right of litigants to have a dispute concerning their civil rights determined by an independent tribunal. The Scottish Human Rights Commission in their Access to Justice Report in 2012 noted that the European Court considered that factors including the complexity of the law and procedure, the public interest, and the litigant's ability to represent him or herself effectively should be taken into account. The paper ignores these factors. It gives no weight to them in areas where there is likely to be the most serious social impact on individuals in great social need.

Individuals who have suffered a personal injury, who face eviction, who are in poverty due to losing a job, or who have high levels of debt for example, may well be subject to physical or mental disability or be otherwise vulnerable. Representation before an employment tribunal may be the only redress for an employee suffering discrimination.

The Society's own Equality and Diversity Strategy recognises that it has a General Equality Duty under the Public Sector Equality Duty, but no thought is given to this in the paper. There is no evidence in the paper of any steps taken by the Society to consider the potential adverse equality impact of its proposals on protected groups. Further, the paper does not consider any consequential additional public expenditure which might be required by the effects of its proposals.

## **2. Lack of Evidence**

The paper proposes that Criminal Legal Aid be enhanced at the expense of Civil Legal Aid.

It may be that additional resources are required for representation in criminal cases. If so, this is not an argument made in the paper. The authors suggest that their proposals will make the Legal Aid system simpler and more efficient. It is not clear from the particular proposals suggested that this would be achieved. The paper simply sets out new fee



structures for Criminal Legal Aid work. There is an implicit assumption that this would require a higher level of funding.

The paper is completely lacking in evidence showing how Criminal Legal Aid is underfunded at the moment. It does not explain any shortfall in Criminal Legal Aid funding which results in under-representation in criminal courts or miscarriages of justice. It does not attempt to quantify the extent, if any, of any shortfall. It does not attempt to quantify the savings achieved from its proposed changes to Civil Legal Aid.

It does not take into account the general downward trend in the demand for Criminal Legal Aid work. Grants of solemn Criminal Legal Aid have been fairly static over the past five years, but there has been a reduction in summary cases from just over 100,000 in 2009/10 to around 86,000 last year, albeit with a slight increase over the last two years.

There is nothing in the paper which sets out the need for increased Criminal Legal Aid funds, and there is no justification for the reduction in Civil Legal Aid funds.

### ***3. Lack of balance between Criminal Legal Aid proposals and Civil Legal Aid proposals.***

The paper sets out, at pages 30 to 36, proposals for reforms in Criminal Legal Aid for those going through the criminal courts. It proposes new fee structures for solemn and summary cases and children's cases as well as for police station interviews. Some of these proposals are comparatively detailed.

The authors argue for a certificate to be granted at an early stage in procedure. This proposal might be appropriate for criminal work, where attendance at court might be anticipated at an early stage in the case. Consideration is given as to how this idea might operate in a number of situations.

The proposals for Civil Legal Aid are argued in much less detail. It is not clear why one civil certificate, which would cover work in chambers and representation at court, should be granted at a very early stage in the case. The majority of civil cases are unlikely to go to court and are often settled by negotiation. Civil matters are more likely to be settled at a preliminary stage and court action may well be avoided. Inadequate consideration is given to the differences between criminal law and civil law.

This failure is exacerbated by the proposal that the availability of Civil Legal Aid and Civil Advice and Assistance should be reduced for large numbers of the population and for substantial categories of work. No consideration is given to the effects this will have on the members of the public affected. The proposals for Civil Legal Aid are ill-considered and arbitrary, and there is not even an attempt at justification.

The authors of the paper propose that financial eligibility for Legal Aid is reduced, resulting in fewer people having access to justice, and that the availability of Legal Aid and Advice and Assistance should be entirely removed in the areas of:

- breach of contract
- debt

- employment law
- financial only divorce
- housing/heritable property, and
- personal injury (with the exception of medical negligence).

It proposes additional reductions in other areas, for example in regard to adults with incapacity.

The proposal in the paper that the reduction in Legal Aid should be replaced by an enhanced network of advice agencies is, with respect, an indication that the authors of the paper have very little knowledge of this area of provision.

Legal aid income relating to individual clients represents a substantial proportion of funding for solicitors working in these areas, especially in Law Centres. Eradicating Legal Aid funding in the ways suggested will lead to a huge reduction in provision. This will not be replaced by additional voluntary sector funding. The result will simply be substantially reduced representation in these cases with consequential serious social problems including much higher levels of eviction.

#### **4. Higher Criminal Legal Aid fees and lower social welfare law provision**

The paper is vulnerable to the charge that solicitors are seeking higher fees in criminal cases, and this should be paid for by reductions in the legal services available for those facing homelessness, employees in dispute with their employers, and increased deprivation for those who are already on low incomes, facing poverty or experiencing destitution. The authors appear to have very little knowledge of the current social context. Incomes for the low paid are not increasing, benefit rates are reducing, benefits are being removed from over one million claimants per year and the use of foodbanks is going up exponentially. These are very real and urgent problems for hundreds of thousands of people in Scotland. It is these people who need representation in many of the areas of law mentioned above and it is they who will be affected by the changes.

The authors of the paper are proposing that these social difficulties should be exacerbated by withdrawing legal representation from people in these circumstances and thereby cutting off the redress afforded by courts and tribunals.

The proposal that solicitors' income should be protected and even increased in this social context is completely counter-productive.

#### **5. Maintaining access to justice – engagement with existing initiatives**

As solicitors we should be ensuring that the interests of our clients are protected. As a Society we should not be promoting one sectional interest over another. The principle of universal access to justice for all types of legal need should be protected, not undermined, by the legal profession.



The Scottish Government has not sought to devalue the legal system in this way. It would be more productive to engage with them in a more defensible way, rather than set off one section of the profession, and their clients, against another.

## SCOTTISH COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

I welcome the opportunity to comment on the proposals in this Discussion Paper and their potential impact on children and young people across Scotland.

### Role of the Commissioner

As Scotland's Commissioner for Children and Young People, my role is to promote and safeguard the rights of all children and young people in Scotland<sup>5</sup>. This extends to young people up to the age of 18 or 21 if the young person has ever been looked after (in care).

Whilst I am conscious of the desire to make savings to Legal Aid, I would urge the Law Society of Scotland to ensure that children and young people are not disproportionately affected by these proposals.

### Funding of Civil Legal Assistance for Children and Young People

The Discussion Paper states that there is no intention to amend the scope of children's legal assistance at present. However, for cases falling outside the Children's Hearings system, there continues to be a real barrier to children and young people accessing justice. The Civil Legal Aid (Scotland) Amendment Regulations 2010 and the Advice and Assistance (Scotland) Amendment Regulations 2010 have led to children and young people's eligibility for Civil Legal Aid being assessed on the basis of their parental income, rather than their own (as had previously been the case).

This had had the effect of denying some children and young people a voice in key decisions affecting them. Anecdotal evidence received by my office would suggest that, without legal representation, children and young people can often feel that their views are neither heard nor given sufficient weight. This is particularly true of cases where there is a dispute around family contact.

Article 12 of the UN Convention on the Rights of the Child states that *"a child who is capable of forming his or her own views {has} the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*<sup>6</sup> Article 12 goes on to state *"the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

I would argue that, whilst the changes brought about by the 2010 Regulations may have made some nominal savings, the impact on children and young people is substantial. These

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<sup>5</sup> Commissioner for Children and Young People (Scotland) Act 2003, Section 4 (1)

<sup>6</sup> UN Convention on the Rights of the Child,  
<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

Regulations have the potential to breach Article 12 of the UN Convention, as they restrict a child or young person's ability to seek legal representation and to have their views heard in their own right (where they have the capacity to do so).

I would urge the Law Society of Scotland to seek an early review of these Regulations.

#### Privately-funded Legal Advice/Loans Scheme

I note the Society's proposal that the qualifying threshold for Legal Aid should be lowered and an increasing number of cases should be delivered by private providers. This would be funded via a loan arrangement. I would highlight the fact that children and young people would not be able to enter into such a loan agreement, and would therefore be dependent on their parent taking out a loan on their behalf.

Where a child is involved in a family/contact dispute and a parent is already funding their own case, they are unlikely to want (or be able to afford) the additional expense of funding their child's case too. This will effectively remove the child/young person's right to be heard.

Where a parent is not another party to the case, the financial implications are still likely to put many families off pursuing a case, even when there are clear indications that a child/young person's rights are being or have been breached.

#### Areas Eligible for Civil Legal Assistance

I also note the intention to remove certain areas from the scope of civil legal assistance, as part of a broader shift towards advice being provided by support/advice agencies.

I am unclear as to the reasoning behind the choice of areas to be removed. It would appear to me that areas such as housing and debt are most likely to affect those with other vulnerabilities.

For example, a young person leaving care may struggle to maintain a first tenancy and need legal assistance fighting an eviction. A mother having experienced domestic abuse may also need help with housing and or debt issues. Without that help, there is a risk that the whole family could become homeless.

Whilst support and advice bodies can help with these issues, and already do so to a very high standard, there are some cases where legal assistance will still be required. Under the new proposals, this would not appear to be available without paying for it privately.

It seems to me illogical that those who are financially most at risk should be asked to get into further debt in order to resolve their difficulties.

#### Availability of Advice/Support Agencies

There is a further issue in that access to advice services may not be equitable across Scotland. Children and young people in rural and remote areas may find it more difficult to access these services than their peers in urban settings. Other groups of children and young people may also find it more difficult to seek advice (e.g. children with disabilities, Gypsy Traveller children, children for whom English is not a first language etc.).



Despite the stated intention to ensure that these services are adequately funded, given the current financial climate, there is a significant risk that funding (and it is unclear from the Discussion Paper where it's envisaged this should come from), will be cut in future.

Whilst there are many excellent advice services across Scotland, only a small proportion is geared exclusively towards children and young people. Not all advice agencies will be able to handle difficulties in a child and young person friendly way. My own office regularly refers children and young people onto specialist child law centres. These centres are staffed mainly by solicitors and funded through a variety of sources, including Legal Aid. The proposals contained in this Discussion Paper run the risk of constraining these services and reducing access for children and young people to advice tailored to them. Children and young people require a particular brand of support and advisors who are aware of and sensitive to their needs. The child and young person specific services that currently exist are excellent and well used, although as previously mentioned, not universally available.

#### Wider Impact

The impact of this proposed approach is likely to go beyond an individual child or young person. Cases that are taken to court on behalf of children and young people can also provide useful precedents and lead to wider change for children and young people. Removing eligibility to Legal Aid for children and young people in these circumstances, and directing children and young people instead towards other advice bodies, could have the unintended consequence of preventing this wider systemic change taking place. This would seem to run counter to children and young people's best interests<sup>7</sup>.

#### Early Resolution of Cases

The Discussion Paper outlines an intention that changes to Legal Aid should prevent future cases becoming unnecessarily lengthy. I would agree that in many cases, it is in the child's best interests to have matters resolved as soon as possible. However, I would not want this to rule out the possibility of a case being brought back to court at the child/young person's own request. As the child or young person grows in age and maturity, they should have the opportunity to revisit a decision, should they want to do so. Again, a change to the 2010 Regulations would be helpful in ensuring that the child could access Legal Aid independently, without reference to parental income.

#### Children's Rights Impact Assessment

Whilst this Discussion Paper states that it is not primarily focused on children and young people, the proposals contained within it are far-reaching and likely to impact negatively on vulnerable children, young people and their families. For this reason, I would recommend

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<sup>7</sup> UN Convention on the Rights of the Child, Article 3  
(<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>)



that a Children's Rights Impact Assessment (CRIA)<sup>8</sup> is carried out to measure the full impact of these proposals on these children and young people, prior to any proposals being progressed.

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<sup>8</sup> See (<http://www.sccyp.org.uk/search-results/?keywords=cria>) for details of the Children's Rights Impact Assessment model developed by Scotland's Commissioner for Children & Young People.



## SCOTTISH COUNCIL OF VOLUNTARY ORGANISATIONS

We the undersigned would like to express our concerns regarding the proposal from the Law Society of Scotland to remove certain aspects from the scope of civil legal aid.

We agree that legal aid in Scotland needs reform in order to create an effective, efficient and sustainable service, especially in the context of a sustained decrease in funds for legal aid in recent years. However, the proposition made by the Law Society to omit certain areas from the scope of civil legal aid risks putting our most vulnerable in jeopardy with no realistic prospect of improving our current system of legal aid for either lawyers or the public.

The areas that the Law Society proposes be removed from scope of civil legal aid include debt, employment law and housing/heritable property along with several other aspects.

First, if the Scottish Government were to adopt this proposal thousands of people would be excluded from the protection of their rights. Under these areas there could be cases involving evictions, unlawful harassment of tenants, unfair dismissal of workers and workplace discrimination. All of these are serious issues which could require the expertise of, and representation by, a lawyer and yet the paper fails to discuss the potential impact this cut could have on individuals and families.

Moreover, without civil legal aid, access to a lawyer in these cases would have to be funded privately, through other means. One solution suggested by the Law Society is to take out a loan, which given that one of the areas they wish to remove from the scope of civil legal aid is debt, appears inconsistent.

Second, the paper also fails to explain how the Law Society has determined that the areas outlined are suitable for removal from the scope of legal aid and therefore gives no justification for their omission. We would be interested to learn more from the Law Society about why these particular areas were chosen.

Third, the discussion paper does not outline what savings would be made through the removal of these areas from civil legal aid but makes the presumption that any efficiencies made would be put back into the Legal Aid system and perhaps directly to lawyers and not subsumed by the Scottish Government budget.

Lastly, and interestingly, the proposal to take these areas out of legal aid is preceded by the following:

*'Our proposal to consider removing certain areas from the scope of legal assistance in Scotland is contingent on there being a properly funded and widely available advice network.'*

Notably the document gives no indication of how such funding would be guaranteed. This shows a lack of understanding about how the advice sector is funded, the way in which the sector operates and of the numerous pressures the sector currently faces. Nevertheless, the intent is clear. In the instances outlined above the advice and advocacy sector would provide assistance instead of lawyers.



There is a wealth of knowledge and experience in the advice sector and the dedication of those working to support those in need of, for example, debt advice is not in doubt but simply put they are not lawyers.

Solicitors need to be involved in all aspects regarding the protection of our citizens' fundamental human rights. We cannot deny the most vulnerable in our society access to core areas of Civil Justice. Therefore it is crucial for civil legal aid that lawyers continue to be involved in it.

Thousands of people depend on legal aid to compensate them when they suffer injuries, when they are threatened with eviction for rent or mortgage arrears, when they are homeless, where they are unlawfully dismissed or discriminated against. In the majority of these cases they need the specialist skills of Legal Aid lawyers.

Ultimately, what the Law Society hopes to achieve from this proposal is unclear and could put our most vulnerable at risk.

We look forward to seeing what further work the Law Society will undertake on the issue of legal aid reform.

Yours sincerely,

John Downie, Head of Public Affairs, SCVO

Lily Greenan, Manager, Scottish Women's Aid

Graeme Brown, Director, Shelter Scotland

Grahame Smith, General Secretary, STUC

Paul Brown, Principal Solicitor, Legal Services Agency Ltd.

Mike Dailly, Principal Solicitor, Govan Law Centre

Angus MacIntosh, Secretary, Scottish Association of Law Centres



## SCOTTISH COURT SERVICE

Thank you for your invitation to respond to the above discussion paper.

I appreciate the important role that the provision of legal aid plays within the justice system and in particular I welcome any change to the provision of legal aid which encourages early resolution in both criminal and civil cases.

As is recognised in the discussion paper both civil and criminal justice will be substantively reformed within the coming years. In fulfilling our responsibilities in supporting the judiciary we aim to reduce delay and cost within the court system as far as possible and part of our focus will be to maximise the use of technology in courts to improve our services.

It is hoped that some of the changes in the use of digital technology will impact positively on the profession and I will be interested to follow your progress on the reform of the provision of legal assistance and will welcome further discussion on how any proposed changes within SCS can assist once policy formulation is complete.

In the meantime, I have no further comments to make on the attached paper.

Yours sincerely

Eric McQueen

Chief Executive

## SCOTTISH LEGAL AID BOARD

The Scottish Legal Aid Board administers the legal aid system, advising Ministers and implementing Scottish Government policy on legal aid within the current legislative framework. We also employ solicitors to provide both civil and criminal legal assistance, grant fund a wide range of organisations to provide advice and representation on housing, debt and benefits issues and monitor and report on the availability of legal services.

The proposals set out by the Law Society of Scotland in its discussion paper on legal aid should be seen in the context of the Scottish Government's policy on legal aid as set out in the Sustainable Future paper published in 2011. This policy is underpinned by four principles:

1. Focussing legal aid on those who need it most
2. Ensuring wide access to justice; giving the right help at the right time
3. Maximising the value of legal aid expenditure
4. Making the justice system more efficient

SLAB's view is that any proposed programme of change to the system must be assessed against these four principles.

### **LSS Proposals**

We welcome discussion about the future of legal aid. Change is undoubtedly needed – to simplify the system, to support access to justice and to achieve value for money – and we have said so publicly. The profession has an important role to play in developing and contributing to the implementation of any proposals for change, and we look forward to the eventual outcome of the Society's consultation process. However, while we welcome any contribution to the debate, we disagree with many aspects of the discussion paper and, in considering the next stage, would urge LSS to address what we see as five fundamental issues.

1. The proposals are currently based on a very narrow view of the legal aid system and appear to be very much based on a solicitor perspective. This leads to proposals to reduce the scope of civil legal assistance which make very little attempt to take into account:
  - a. the impact of the proposals on clients and on access to justice
  - b. the mixed market of providers of legal aid,



- c. the expanded role of the legal aid fund to support grants for the advice sector or SLAB's role as direct provider of legal services.

Reducing scope as suggested by the LSS would reduce payments made to solicitors for case work by around £6million per annum. It would take over 24,000 people out of scope each year. Such wholesale and unfocused withdrawal of legal aid in the listed areas would leave people facing complex civil law problems without access to specialist legal representation and potentially lead to higher costs in other parts of the justice system if more people were unrepresented in the civil courts or tribunals as a result.

Within the paper itself, LSS rightly point out that research has shown that investment in legal assistance can deliver savings to other public services, to the wider economy, and add value to both clients and communities. We recognise this important contribution made by publicly funded legal assistance. However both research studies referenced by the LSS in support of this statement support investment in exactly those legal areas which LSS suggest are taken out of scope. The research evidence does not support the proposals in the paper.

Contrary to the central premise of the paper that the legal aid system has not kept pace with wider changes, the last fifteen years have been characterised by significant evolution both of the structures and processes underpinning the traditional legal aid model and the delivery model itself. Legal aid has developed from a system which funds casework undertaken by solicitors and advocates operating in traditional business models to the current position which supports targeted grant funded assistance, direct services provided by SLAB alongside the traditional solicitor model of case by case legal assistance in private businesses and law centres.

This context is important, as the proposed reduction in scope of case by case funding of access to solicitors would, if access to justice were not be fundamentally harmed, likely need to be accompanied by a corresponding increase in other forms of provision. The paper fails to recognise that these other forms of provision also require financial support and that such support is also predominantly provided via the public purse, both by the Legal Aid Fund and other public funders. Therefore the suggestion in the discussion paper that savings flowing from reductions in scope – removing employment, debt, housing and other areas - could be reinvested in the remaining solicitor services is based on a misunderstanding of the funding structure of the advice sector and indeed the scope of the Legal Aid Fund itself.



2. The LSS assert that the current system is not fit for purpose and consequently a root and branch review of legal aid is required. This claim lacks resonance as the paper neither articulates a clear purpose for legal aid nor demonstrates how the system fails to achieve that purpose.

We do not accept that the system is not fit for purpose. The paper states that the system has not kept pace with and adapted to change in the justice system. Legal aid is an essential partner in the justice system and has adapted to support the Scottish Government's justice initiatives. This has included major changes in 2008 to support Summary Justice Reform, major reform of civil legal aid which introduced block fees and quality assurance, fundamental change to the system of legal aid in children's hearing cases and the development and use of grant funding.

The three examples highlighted by the LSS as examples of the system not meeting the needs of the system raise difficult issues in respect of the LSS and profession's role in negotiating change to support system changes: all these issues have been canvassed in negotiations with the LSS, e.g., a section 76 early settlement fee was first canvassed and rejected by the profession in 2006.

Nonetheless, notwithstanding the occasional failure to reach agreement with the profession, the system helped fund 818 businesses, law centres and advice agencies and delivered 246,284 acts of assistance via Advice & Assistance and Legal Aid last year (not including assistance via the grant funded projects). The system is therefore capable of delivering assistance to large numbers of people via a wide range of providers.

We would argue strongly that legal aid has kept pace with and both adapted and positively contributed to change in the justice system. Further change is both necessary and desirable, both in response to changes in the civil and criminal justice system, and as part of our savings programme, but to characterize this as a need for root and branch reform is both to overstate the need for change and to underestimate the extent of change that has already happened.

3. LSS state that the system is overly complex and that this is a significant barrier both to access to assistance for those in need of help and a major problem for those delivering that help. This claim too is undermined by the sheer volume of assistance currently provided and the range of providers who remain active within the system.

That is not to say that the system is wholly free of complexity: there are a range of different aid types, each with different rules, precisely because the broad scope of



legal assistance supports the delivery of a wide range of assistance in varied situations. It would not be possible to take account of the important differences in dispute resolution routes for different types of problems and for people with widely varying personal circumstances using a one size fits all approach.

However, we would not agree that this leads to the problematic degree of complexity as the LSS assert. Most assistance is accessed via solicitors whose skill is in understanding legislative provisions - the general public does not navigate the system without access to skilled help from professionals.

LSS state that, "Significant amounts of secondary legislation and increasing volumes of guidance has created a complex system that lacks clarity and is administratively burdensome". There are indeed some complexities in the system and indeed some of these have been created to accommodate requests by the profession for the legal aid system to take account of the nuances of the wider justice system. For example, over time additional fee elements, some with specific additional tests, have been added to reflect particular elements of procedure. Such changes do increase the complexity of final accounting by solicitors and approval by SLAB. However, it is simply untrue to state that this leads to a degree of complexity, uncertainty and challenge such that taxation is a regular feature of legal aid accounting, as stated in the paper. SLAB paid accounts in over 200,000 cases last year and only 18 accounts were taken to taxation.

Changes to secondary legislation also arise from change in the justice system and supporting change in the legal aid regulations. For example the introduction of a new court rule such as Chapter 33AA has produced a request from LSS that the fee structures are amended. Responding to that request will undoubtedly lead to new guidance and a new regulation.

SLAB agrees and has already stated that there are further opportunities for continued simplification and streamlining of the legal assistance system. Indeed, some complexities remain in place despite SLAB and Scottish Government proposals to move to simpler feeing systems. LSS have now suggested a block fee system in solemn criminal cases. Proposals formulated in 2006 to introduce a fully blocked system of feeing in solemn criminal legal assistance were rejected by the profession. These proposals included a section 76 block fee for early settlement which is now called for.

The assertion in the paper that court users (by which we presume means legally aided clients) have difficulty understanding the system is not supported by research with applicants and solicitors. SLAB conducts surveys with applicants to find out how well



they understand the process and how satisfied they are with the services they received. The most recent civil applicant survey and civil solicitor survey in 2013 reported high levels of satisfaction. Most applicants who responded (83%) felt that their situation would have been worse without legal aid and were satisfied on key measures around using and understanding legal aid and the legal system. Amongst those who gave a view, 84% were satisfied or neutral regarding 'overall experience of the full legal processes, 95% with 'ease of starting to use legal aid' and 90% with 'ease of understanding of the whole legal aid system'.

4. In terms of levels of funding and the impact on the profession, there are three main charges made in the paper: that there has been a real time decrease in funding; that current levels of payment are unsustainable for the profession; and that legal assistance solicitors are not paid for areas of routine practice.

It is true to say that the cost of legal aid to the taxpayer is lower now in real terms than at some points in the past. However, this is not due to a failure of the legal aid budget to keep pace with inflation. Instead, it is a combined consequence of a significant decrease in activity in the justice system as a whole and the success of measures taken over recent years to encourage greater efficiency and cost effectiveness, both in the justice system and in the delivery of legal aid services. It is also worth noting that, despite the overall real terms reduction in expenditure, average costs per case have increased in many types of cases.

Over the past six years there has been an increase in the number of firms and solicitors registered to provide legal assistance. Despite an underlying trend in criminal legal assistance of falling crime rates and prosecutions (a slight increase in criminal business in the courts in the past year notwithstanding) the number firms and solicitors has increased: from 575 firms and 1368 solicitors registered to provide criminal legal assistance in 2009 to 581/1409 firms/solicitors in 2014.

Civil business has increased during the recession, with greatest growth in contact/residence disputes involving children and applications for orders to assist in financial management for, and care of Adults with Incapacity. The number of firms registered to provide civil legal assistance increased during the recession, rising from 634 firms in 2009 to 679 firms in 2014.

Neither of these trends suggests that firms are unwilling or unable to provide services at legal aid rates.



The paper observes that legal assistance solicitors do not receive additional payments to verify a client's eligibility or for certain aspects of the processing of accounts. These are normal business overheads. The paper fails to note the significant benefits to solicitors in SLAB's process of digitalisation of the applications process, which will also soon fully extend to accounts. This process enables solicitors to adopt more efficient business processes and reduce overheads, including by reducing reliance on law accountants.

5. There is little in the discussion paper which looks at the current models of provision of publicly funded legal services by solicitors and examines whether it promotes the public interest or access to justice. Any root and branch review as suggested by LSS, should look closely at the current delivery model and assess whether it serves the needs of the public, reflects wider changes in the composition and organisation of the legal profession or takes full advantage of the opportunities offered by new technology.

The LSS is a membership body for Scottish solicitors and a regulator. As a regulator its statutory objectives include protecting and promoting the public interest and promoting access to justice. We hope that the next stage of the LSS consultation takes the opportunity to consider what if any changes within solicitor business structures and models would advance the needs of the public and create the conditions for modern public service delivery.

Solicitors are key partners in the delivery of publicly funded legal services. Unlike other parts of the public sector, the private sector businesses which provide legal aid services do not have a contract with the public sector to deliver these services with a view to achieving particular public service outcomes. The relationship between the paying authority (SLAB) and the deliverer of services is largely conducted on a case by case basis via the nominated solicitor. This can cause some difficulties for businesses, as employed solicitors can leave their employers with an existing case load and, often, the value of the work in progress. Structurally, our observation is that this model can promote both short termism and a fragmented supply base of small firms, who resist expansion and medium to long term business development for fear that today's employed solicitor will become tomorrow's competitor for public funds. Clearly this presents challenges in terms of building a platform for the delivery of a key public service. These are matters on which the discussion paper is silent and on which we would welcome discussion.



We hope that these comments are of assistance to LSS in further developing its proposals. There are a number of factual errors in the detail in the Discussion Paper which we will address in correspondence with the LSS rather than in the body of the response. We would also be happy to engage further with LSS as next steps are considered.

## SHELTER SCOTLAND

### **Introduction**

The Shelter Scottish Housing Law Service (SHLS) is aware that the Law Society of Scotland has published a discussion paper on Legal Aid which proposes wide ranging changes to the current system. It is our view that there are a number of areas of serious concern outlined within the proposals in the discussion paper.

### **About SHLS**

The SHLS is an independent Scottish housing law service, which aims to address unmet need for legal advice and representation in Scotland, and through this to prevent homelessness. The SHLS provides advice and information on housing law; a consultancy and referral service for Shelter Scotland advisers, fieldworkers and Helpline workers. It also provides direct legal advice and court representation to clients referred to the service. SHLS receives direct funding and makes claims on the Legal Aid fund to carry out this work.

### **Summary of Key Points**

SHLS is aware that the discussion paper is considering proposals to revise the whole Legal Aid system. Given that SHLS only has experience of Civil Legal Aid and Housing Law we have restricted our comments to these areas.

The following is a summary of the key points outlined in this response paper:

- SHLS has grave concerns about the proposal to remove Housing Law from the scope of civil legal assistance.
- Housing Law impacts disproportionately on the most vulnerable in society. The proposals outlined in the Law Society's discussion paper would remove protection currently offered to them.
- Housing Law is a complex, fluid area of law that requires specialist legal advice and representation.
- If Legal Aid were not available and the proposal that advice centres represent individuals instead were to be implemented this would significantly affect individuals' access to justice.
- If Legal Aid were not available to those with Housing Law difficulties there is likely to be a net loss to the overall public purse. Any savings seen in not providing Legal Aid to this area would likely be outweighed by the costs of increased homelessness, and medical services following on the negative impact of lack of or poor housing on individuals.

### **General Comments**

SHLS has grave concerns about the proposal to remove Housing Law from the scope of civil legal assistance. In Shelter Scotland's experience Housing Law impacts disproportionately on the most vulnerable in society. This proposal would remove protection currently offered to them. In addition, Housing Law is a complex, fluid area of law that requires specialist legal advice and representation.

One of the fundamental principles that underpins Legal Aid is equality of arms. The vast majority of Housing Law matters involve corporate landlords (such as local authorities) or mortgage companies. These bodies are usually represented by a solicitor who specialises in Housing Law. To expect individuals defending such actions to seek assistance from someone who is either not a solicitor or not a specialist in Housing Law is unjust.

With the current system of Legal Aid available to all solicitors clients have the choice of who they wish to instruct. This choice should not solely be the preserve of those who can afford it. If Legal Aid were not available and the proposal that advice centres represent individuals instead were to be implemented this would significantly affect individuals' access to justice. If they could not pay a solicitor on a private fee paying basis they would be restricted to a small number of advice bodies. This would be especially so in rural areas. This issue could become more acute if that agency required to withdraw from acting or if there was a breakdown in the relationship. In those circumstances, the individual may not be able to access their only local advice provider.

The existence of a Legal Aid Certificate allows a motion to be made to modify expenses to nil. This recognises that those who are eligible for Legal Aid often are in a poor financial position. The law recognises that, in those circumstances, it would be inequitable for them to be liable for expenses. This is an important protection.

It is noted that the discussion paper concludes that around 75% of the Scottish population are currently financially eligible for civil legal aid. It is submitted that this is a slightly misleading figure in the context of considering savings to the Legal Aid budget.

The upper income limit for Civil Legal Aid is currently £26,239 per annum. Clients require to start paying contributions to their Legal Aid at £3,521 per annum. Therefore, a large portion of that 75% will require to contribute to some or all of the Legal Aid account. In addition, clawback allows the Legal Aid Board to recover funds paid out if the client is successful in obtaining property.

Further, if Legal Aid were not available to those with Housing Law difficulties there is likely to be a net loss to the overall public purse. Any savings seen in not providing Legal Aid to this area would likely be outweighed by the costs of homelessness, and medical services following on the negative impact of lack of or poor housing on individuals. This would therefore turn into a false economy overall.

### **Advice Agencies**

We note with interest in the proposal that bodies such as Law Centres and specialist organisations would offer support which would mitigate the effect of Legal Aid no longer being applicable to areas such as Housing Law. Shelter Scotland has experience of publicly funded projects that provide legal advice and representation to clients.

Funding can be restricted to a particular geographical area. If this were to be how funding were to continue in the absence of Legal Aid, this could lead to a patchwork effect that could impact on universal availability.



Funding can be restricted in subject matter. By way of example, one funder may wish to focus on economic cases (such as evictions due to arrears). This would mean that that project would not be able to, for example, take Judicial Review actions to challenge homelessness decisions made by local authorities.

It is difficult for funders to administer open ended budgets. Therefore it is likely that funding would be subject to a cap. In the nature of litigation it is difficult to accurately anticipate all outlays that will be incurred. By way of example it is conceivable that defending a 'simple' action of eviction due to rent arrears could lead to instruction of an architect to speak to dampness problems and medical experts to speak to medical problems experienced by the tenant. This could lead to outlays of around £1,000. In the current system these outlays would be covered by the grant of Legal Aid provided sanction had been obtained. If Legal Aid were not available advice agencies would require to estimate how many such cases that they would deal with in a year in order to submit a budget for funding. This could lead to advice agencies requiring to avoid or placing a limit on dealing with complex cases for budgetary reasons. As matters stand, Shelter Scotland understands that many advice agencies currently rely upon Legal Aid to 'top up' their funding to address this issue.

Due to restrictions on funding many advice providers require to keep costs to a minimum. This is often achieved by a mixture of Solicitors and Lay Representatives. Lay Representatives are a hugely useful resource and can provide invaluable support to clients. However, if finances were to be restricted then it could be expected that the balance may move towards an increased reliance on Lay Representatives. This could pose the following problems:

- Shelter Scotland's interpretation of the Court Rules as they currently stand is that Lay Representatives cannot competently fully conduct a Proof in Summary Cause actions such as those for recovery of possession.
- Lay Representatives cannot appear in Ordinary Cause matters. Whilst Lay Representatives who are authorised under the Homeowner and Debtor Protection (Scotland) Act 2010 are competent to appear in Summary Application actions relating to mortgage arrears there are other Housing Law actions (such as actions for Specific Implement) that are Ordinary Cause matters.
- Housing cases can involve the citing of Expert Witnesses such as architects and medical witnesses. Only a Solicitor or Sheriff Officer can cite a witness. In addition, witnesses have the comfort that a Solicitor is personally liable for that witnesses' fees and expenses.

Not all advice agencies are able to provide specialist Housing Law advice and representation. Many are more general in nature. The existence of these general advice providers, whilst providing very significant assistance to many individuals cannot appropriately replace specialist legal advice and representation.

In addition, advice services by their nature are open to all. This could have the unexpected consequence of free legal advice and assistance being provided to those who could afford a solicitor. The present system of Legal Aid means testing means that public funds are not spent on those who could afford a solicitor.

Taking these concerns together the only circumstances where SHLS would not oppose housing being removed from the scope of civil legal assistance would be if the following criteria were established:

- A guarantee is provided that sufficient funding will be available.
- Advice agencies are provided with open ended funding.
- Advice agencies are funded to provide advice and representation on all aspects of Housing Law.
- All of Scotland is suitably provided by appropriately accessible advice agencies.
- The funding is structured to provide an appropriate balance between legally qualified and non-legally qualified staff

### **Single Continuing Grant**

SHLS agrees in principle that a single continuing grant of Legal Aid would reduce the administrative burden and looks forward to being advised of further information regarding this.

### **Alternative Funding Methods**

With the exception of actions for damages, Speculative Fee Agreements are not usually applicable in Housing Law situations. We can see that this could be extended whereby if a client manages to successfully defend an action for eviction a fee uplift is applied and the client charged. Given that many clients in this situation are in significant financial difficulty such an arrangement would make any victory pyrrhic if they were then to be charged an inflated fee. In any event, it is not entirely clear why those with insufficient income to fund a solicitor on a private fee paying basis should be penalised by inflated fees under a Speculative Fee Agreement.

SHLS also has significant concerns regarding the proposal of a loan to cover legal expenses. Many of the clients whom SHLS acts for are in arrears. This is often due to an overreliance on credit. It would be disingenuous to encourage such clients to get further into debt.

It is not clear if this would be a commercial loan and if interest would be charged on it. It would seem odd if it were not commercial in some way as the administrator would, presumably, wish to profit from it somehow or at least cover costs. In those circumstances, it is not clear why those with insufficient money to instruct a solicitor on a private fee paying basis should be required to, in effect, pay more than those who do have sufficient money.

Currently where a client pays a contribution towards Legal Aid if their circumstances change the level of contribution and repayment rate can be reviewed. Under a loan scheme the capital element of the loan would not be capable of change.

In addition, we would be concerned with any proposal whereby solicitors become debt collectors. This would potentially become non chargeable work that firms would have to carry out which would discourage firms from undertaking work for clients with low income.

Payment plans are also not attractive in that these would be detrimental to clients of low funds. The same comments as above regarding debt collection apply.

## SIMON BROWN

I'm grateful for the opportunity to respond to the Legal Assistance in Scotland discussion paper, and would first of all like to commend you on a well argued and thought provoking document that certainly created the discussion it was intended to.

To take a broad brush approach, I would agree with all of the broad principles expressed. There is no doubt that the legal aid system is in need of a major overhaul, with both the criminal and civil systems being unnecessarily complex. It is equally important to look at the areas that are covered by legal aid, to ensure that it is targeted at where it is most needed.

In the latter case, I would argue that there is a strong argument for removing areas such as debt and housing law from the vagaries of the legal aid system. As has been pointed out by a number of commentators, these are areas that affect the most vulnerable in society, but surely this in itself is a good reason to remove these areas from the inequality and uncertainty of legal aid and instead protect these people by increasing direct funding to agencies such as Citizens Advice and the Govan Law Centre?

In criminal law, the system needs to be majorly simplified. One certificate with a set of clearly defined blocks would seem the best way forward, and an approach favoured by SLAB as well. Retaining the parity between payments for an early plea and a plea of not guilty and increasing the fees for S.76 and early pleas in solemn cases should ensure 'churn' is avoided. I do not agree with those who say this will encourage guilty pleas. It is one thing to persuade a client nervous of the outcome to string matters out as long as possible, with all the incidental financial benefits to the agent, and quite another to advise on the benefits of an early plea without having strong evidential arguments to back it up. I can see no possibility whatsoever of someone being coerced to plead guilty for financial reasons.

Another area worth reviewing is at the commencement of the case, with appropriate fees for attendance at police interviews. This could be a cost neutral increase, as new regulation could include an obligation to participate in police duty and court duty schemes, thus removing the need for the SLAB solicitor contact line and reducing the share of the PDSO's duty coverage, both of which would make considerable savings.

This is a discussion worth having, particularly so since it would appear that SLAB are keen to explore the area. We should not be distracted by negative comments from those who are profiting from the current system and should pursue the arguments with vigour.

## STUART HUNTER

I am a Civil Court Practitioner specialising in Civil Litigation and, in particular, in Family Law work. I do not do any Criminal work, Employment Law work or Personal Injury work. Accordingly, my observations are confined to that part of the discussion paper which relates to **Civil** Legal Assistance.

I have been involved in Civil Legal Aid throughout the entirety of my professional career. I therefore have been dealing with the Legal Aid Scheme, in its various guises, for more than 25 years.

I would firstly advise that the existing Scheme has become virtually unworkable. It is virtually impossible for clients to understand or comprehend its complexities. They struggle to understand the difference between Legal Advice & Assistance and Legal Aid, particularly in relation to the "recovery" or "clawback" elements. Solicitors (and indeed Legal Aid Board staff) also struggle with the complexity of the regulations and it is virtually impossible to be "on top" of all that is required to ensure that the Scheme is operated effectively. In short, dramatic improvements are urgently required.

I wholeheartedly support the suggestions made in the discussion papers for changes to the Civil Legal Assistance Scheme. Given that change is inevitable, I think the proposals made here are sensible ones which will provide maximum benefit for the public whilst keeping the Legal Aid budget within reasonable bounds and providing Solicitors reasonable remuneration for doing Legal Aid work where the interests of justice require Legal Aid to be provided.

On the detail of the suggestions, my observations would be as follows:-

1. In general, I would agree with the categorisation of the various areas which should be removed from the scope of Civil Legal Assistance. However, I do not think their removal should be absolute. As recommended, there should be some form of "exceptional" case status that would allow Civil Assistance to be granted in these categories. However, I would hesitate at the use of the word "exceptional" and, in particular, do not think that it should always be necessary to demonstrate "reasonable prospects of success". My specific concern (and I am sure there will be other examples) is that I have had on a number of occasions clients who have come to me, particularly in marital or partnership breakdowns, where the opposing Party has been in complete control of the joint finances and he/she is the only person who has information about the marital or partnership assets. Where that person refuses to co-operate in providing information, it can be impossible to demonstrate



reasonable prospects of success. Without access to Legal Assistance, the client would be unable to exercise any remedy or even to carry out the basic function of ascertaining whether they do or do not have a realistic claim for financial provision. In short, there should be an ability for legal assistance to be granted where the interests of justice dictate that it is necessary and reasonable;

2. The suggestions made appear to me to form a "package" and I think they would require to be implemented as a package. For example, removing the above categories of case from Legal Assistance, without creating a "Legal Assistance Loan Scheme" would potentially be disastrous. There are some commercial lenders already operating in the Family Law field, but those commercial lenders are expensive and the type of cases that they are willing and prepared to provide assistance in are very restricted. There would either have to be significant incentives given by the Government for commercial lenders to get involved in the market, or the Government itself would need to provide some form of loan scheme to assist with legal costs;
3. If financial provision in family matters is to remain within the Legal Assistance Scheme, there needs to be a provision that enables Solicitors to charge their client's fees at private client paying rates (rather than Legal Aid rates) where a recovery is made. I know from discussions with colleagues that those Firms who still carry out Civil Legal Aid work are seriously considering walking away from the existing Legal Aid Scheme entirely. That will be to the massive detriment of the Public interest. The reason for this is that Legal Aid simply does not pay. For Firms that still carry out Legal Aid work, their Legal Aid clients are essentially being subsidised by the Private Paying clients. One way of providing Firms with an incentive to stay in Legal Aid work would be to ensure that, in cases where financial recovery is made for the client, the Solicitor is able to charge a realistic fee.

As always with any proposals, the "devil is in the detail" and I have no doubt that I and many others would have comments on the detail of any new scheme proposed. However, in principle it appears to me that the suggestions made in the discussion paper are thoughtful, sensible and productive. I know that some Solicitors have commented adversely on the suggestions but it would appear to me that a number of their comments are based on either a misunderstanding of what is being suggested or, to be perfectly blunt, are simply a little naive as to what can be achieved in the current economic climate.

## SUPPORTING OFFENDERS WITH LEARNING DISABILITIES NETWORK

Thank you for the opportunity to respond to your discussion paper regarding legal aid. Please note that the answers are the views of the supporting Offenders with learning disabilities network (SOLD). We view the system of legal aid as an essential tool for equality. A modern legal aid system must be responsive to changes in the legal system. Only a properly funded system which provides fair remuneration can maintain a sustainable, high quality service.

Please note our comments in relation to the questions asked :-

- Legal assistance is overly complex, inefficient, outdated and under-funded?

Access to legal aid is access to justice and there is a continuing and indispensable role for a publicly funded legal aid system. There are competing demands on stretched public funds and as such there is a challenge for the legal system, not simply the legal profession, to make efficiencies and cost cutting measures in order to deliver a fair and effective legal system and crucially to safeguard access to justice.

There is merit in a consultation exercise, involving all key stakeholders to develop an innovative legal aid system fit for the new emerging legal system in Scotland. However, the rationale for such an exercise must be to secure access to justice. Undoubtedly value for money will be key but cost cutting should not be decisive.

"Spiralling legal costs" is a headline grabbing phrase but it does little to promote an examination of the causes such as grindingly slow bureaucracy and complexity. There needs to be a social discussion, a cost benefit analysis if you like, to highlight the benefits of the legal aid system; without which inequalities will only grow, participation reduce and inclusion dwindle.

- There could be a single system for criminal legal assistance and a single system for civil legal assistance (rather than ABWOR, A&A and legal aid)?

There is merit in maintaining A and A as the rationale for cuts to legal aid is often formulated in terms of early intervention and prevention, it may therefore be counter productive to recommend the removal of a category which could evidence that advice from a solicitor can encourage early resolution.

- There is a need for a block fee for police station advice work?

The current funding arrangement for police station work is inadequate. Access to a solicitor at a police station should never be restricted by income as it is a vital to ensure the procedural rights of the detainee are protected. Legal advice from a solicitor at a police station is free in each of the other UK countries and there is no possible explanation for it to be otherwise in Scotland.

- Fees could be front-loaded to encourage early resolution of criminal cases?

The solicitors' profession is highly trained and skilled with expertise across the legal spectrum. It is essential that the quality of legal service providers is guaranteed across the board and on an equal basis. The fees paid in criminal legal aid cases must cover not only the solicitor's salary, but also the overheads of running his/her practice. While practices organise themselves differently, all firms have similar overheads which must be covered through fees earned. Overheads include wages for support staff, national insurance contributions, rent/mortgage costs, professional indemnity and other insurances, accountant's fees and other professional services, reprographics, cleaning, transport, etc. All of these costs must be funded from the firm's income. A fee structure must be developed which recognises this. If criminal solicitors are to be remunerated at the lowest possible denominator, then there may well be a consequential expertise drain to other more profitable areas of law.

- The upper eligibility limit for civil cases could be reduced so that expenditure can be targeted in areas that need it most?

No comment

- The areas currently within the scope of civil legal assistance could be reviewed so that expenditure can be targeted on areas that need it most?

Prioritising critical areas for legal aid funding will help maintain an affordable system .

- There should be promotion of alternative funding options and Government loans for legal services?

Legal aid offers value for money both in terms of the outcomes and social benefit. Continued restriction in eligibility criteria is likely to lead to more unassisted litigants, which would clog up the court and tribunals system, and result in a real imbalance in 'equality of arms'. There is also a potential for increased complaints and regulatory problems, especially in the market for quasi-legal services such as mediation, claims management and fee charging debt management firms. Consideration of alternative funding options should only be considered following a thorough review of the consequences of restrictions to the legal aid system and perhaps only then as a bolt on to the system, not a replacement.

I hope our opinion assist your discussion. If we can be of any further assistance please do not hesitate to contact us.

## TOGETHER (SCOTTISH ALLIANCE FOR CHILDREN'S RIGHTS)

### **Access to justice**

Access to justice is an area of considerable concern for children, particularly relating to care leavers and those who are looked after. In March 2014, the Human Rights Council's annual day of the child focussed on access to justice for children.

It was acknowledged that children face substantial barriers to accessing justice. These barriers include lack of knowledge of how to seek justice and concerns from children that they may not be heard or taken seriously. Problems can also arise where there is a conflict of interest between a child and parent. Discussions focussed on the importance of overcoming barriers through access to information and effective legal representation, and ensuring remedies and speedy resolution of cases. Children's organisations have highlighted specific issues relating to children's access to justice.

These include:

- Papers for children's hearings being sent out too late for there to be adequate time to instruct representation and to prepare ahead of the hearing. This has an adverse impact on outcomes for children referred into the hearings system;
- 'Relevant Person' status should be automatically conferred on 'birth' fathers, unless they have had their parental rights removed. However, the Practice Guidance from SCRA, and children's organisations' experience of representing young fathers, indicates that this does not happen.

### **Access to legal assistance and aid**

The Human Rights Council emphasised that children should have access to free and effective legal representation. The UN Principles on Access to Legal Aid provide that legal aid should be free of charge, guided by the best interests of the child and available to children when there is a conflict of interest with their parents. Children have a particular need for legal assistance to enable them to navigate complex laws and legal systems that are generally designed for adults. Lack of legal assistance can leave children in a position of being unable to claim essential rights or services, seek redress for rights violations, or ensure that their rights are protected in criminal justice or other judicial or administrative processes.

Lack of legal assistance has been highlighted by children's organisations as an area of particular concern. In January 2011, regulations were amended to change the way that a child is assessed for civil and children's legal assistance. Previously, a child would be assessed in the same way as an adult, on the basis of their own personal disposable income and capital. Many children would therefore easily qualify for both advice and assistance and legal aid on the basis of being in full time education and being supported financially by their parents.

However, since January 2011, a solicitor assessing a child who applies for any civil or legal assistance must take into account the financial circumstances of anyone who owes a duty of aliment to that child or young person. This duty to aliment a child does not just fall on



parents, but can extend to anyone who has accepted the child as a child of their family, such as step-parents, or in some case grandparents, aunts, uncles etc. This could have consequences for children in kinship care arrangements. There is an exception: where it would be 'unjust and inequitable' to assess the financial circumstances of someone who owes the child a duty of aliment, that person's finances can be disregarded. However, children's organisations report that it is not always straightforward to persuade the Scottish Legal Aid Board (SLAB) that the exception should apply.

Since the change, the numbers of children applying to SLAB and for legal aid to be granted have fallen considerably. A Freedom of Information request illustrates the extent to which fewer and fewer children are able to obtain legal aid. This impacts on the ability of children, including those who are looked after, to obtain legal advice and assistance to ensure a fair hearing.

Children's organisations have raised concerns with SLAB and the Scottish Government about this issue. SLAB has taken account of some of these concerns in redrafting guidelines to include further detail about the application of the 'unjust and inequitable' exception. The Scottish Government is in discussions about the restrictions on children obtaining legal aid. However, fundamental concerns remain. The change to the regulations potentially compromise the child's right to confidentiality, and access to independent legal advice.

### **Recommendation**

The Scottish Government should ensure that all children have access to confidential and independent legal assistance and advice.

## VICTIM SUPPORT SCOTLAND

Victim Support Scotland is the largest organisation in Scotland supporting people affected by crime. We provide practical help, emotional support and essential information to victims, witnesses and others affected by crime, both in the community and in every Sheriff and High Court in Scotland. The service is free, confidential and is provided by volunteers. VSS welcomes the opportunity to make comment on the Law Society of Scotland's Discussion Paper on reform of legal assistance in Scotland, and does so with the best interests of victims and witnesses in mind.

### Criminal legal assistance

Delays, adjournments, unnecessary citations and needless court attendance all add to the stress, confusion, frustration and distress experienced by victims and witnesses as they journey through the criminal justice system. Victim Support Scotland is generally supportive of the changes proposed by the Society in reforming how criminal legal assistance is structured and administered, as we believe they can potentially contribute to improving the efficiency of the criminal justice system, in turn benefitting victims and witnesses.

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. We are particularly receptive to the proposed changes to the remuneration structure so as to avoid the disincentives that currently exist for solicitors to advise their clients to plead not guilty. Furthermore, we welcome the introduction of financial incentives for early guilty pleas in an attempt to increase the number of cases in which early resolution is achieved. We note that late guilty pleas constitute almost a quarter of summary cases that reach trial stage<sup>9</sup>. Being cited for and attending court in such cases results in unnecessary and avoidable stress and inconvenience for victims and witnesses. In addition to the emotional impact, many suffer financial and practical consequences, such as reduced or lost income. We would hope that alongside other criminal justice reforms, such as the proposed Criminal Justice (Scotland) Bill, changes to criminal legal assistance would contribute to a reduction in the number of cases that needlessly reach trial stage due to late guilty pleas.

### Civil legal assistance

It is common knowledge that many individuals find it difficult to understand the criminal justice system in Scotland<sup>10</sup>, and we believe that this is no less true for the system of civil

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<sup>9</sup> Audit Scotland (2011), 'An Overview of the Criminal Justice of Scotland's Criminal Justice System', p.28  
[http://www.audit-scotland.gov.uk/docs/central/2011/nr\\_110906\\_justice\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf)

<sup>10</sup> The 2012/13 Scottish Crime and Justice Survey reported that 76% of respondents said that they did not know very much or knew nothing at all about the criminal justice system. the Scottish Government (2014), 'Scottish Crime and Justice Survey 2012/13: Main Findings', p.77  
<http://www.scotland.gov.uk/Resource/0044/00447271.pdf>

justice. It is desirable that legal assistance arrangements and structures are easy to understand, so that those in need of them can navigate the system more easily. This is especially important for victims of crime, as the stress experienced as a result of victimisation can add to the inherent difficulty of navigating and understanding the legal system. Victim Support Scotland therefore sees merit in a more streamlined and simplified approach to civil legal assistance, replacing the distinction between advice and assistance and legal aid with a general reference to 'legal assistance'. Using the same reasoning, we believe that a single eligibility test on initial application is preferable to the current system, as this would reduce the administrative burden and associated stress on clients at later stages as the case progresses.

The ability to use the civil justice system as a means of redress, protection or general support for victims of crime is fundamentally important; VSS believes that all individuals, regardless of the financial means available to them, should be provided with access to this type of justice. Many victims have a variety of on-going issues in their lives, from housing concerns and personal safety worries to debt problems and custody disputes. This may be no surprise considering that these kinds of problems have been found to be "intrinsically linked to other injustices...social justice and criminal justice issues."<sup>11</sup> We know that many victims currently struggle to afford access to a solicitor for help required through the civil law; for example, the Scottish Crime and Justice Survey tells us that of those who have suffered a civil law problem and have not consulted (or planned to consult) a solicitor, 16% said that this was because they were worried about the cost or did not want to pay the cost<sup>12</sup>.

As such, we have concerns that the proposal to lower the threshold for civil legal assistance would result in exclusion of a further group of individuals; this assumes that those who can currently afford to pay some of their legal fees will be able to pay the remainder. We believe that the Society's suggestion that loans be provided in the place of legal assistance for those who would currently be subject to high contributions (and no longer eligible for legal assistance under the proposed changes) would not be an improvement on the current system. This could force many often vulnerable individuals into debt, which may itself cause a problem for the future; the choice between paying for access to civil justice and not is, for some, no choice at all.

Furthermore, we believe that the Law Society's proposals to remove certain types of issues from the scope of civil legal assistance (such as debt, employment law, housing and personal injury) would create an additional barrier to justice for many individuals in need, further limiting the ability of victims of crime to use the civil justice system to improve their situation, which is often caused by the victimisation experience itself. In addition, the

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<sup>11</sup> Kemp et al., 2007 cited in the Scottish Government (2014), 'Scottish Crime and Justice Survey 2012/13: Main Findings', p.85 <http://www.scotland.gov.uk/Resource/0044/00447271.pdf>

<sup>12</sup> Ibid, p.88



suggestion to remove certain categories of law from the civil legal assistance available would remove the possibility of different issues being handled by one solicitor.

VSS would welcome reassurances on how that the network of advice agencies such as in-court advisors, debt organisations, housing organisations and citizens' advice bureau can be adequately funded and made available nationwide, as is the suggestion in the Discussion Paper. We are concerned that the proposed reliance on third sector or independent advice agencies would create geographical inconsistencies in available help across Scotland; those in rural areas may suffer a double disadvantage, as lower levels of access to advice centres coupled with a generally higher cost of living<sup>13</sup> could make it less likely that they will be able to afford legal advice and representation.

### The use of technology

Victim Support Scotland is supportive of increasing the use of digital technology to enhance efficiencies and cut down on costs, and hope to see this approach implemented across the whole of the criminal justice system, in line with the Scottish Government's Justice Digital Strategy. We look forward to a criminal justice system that is efficient, coordinated and sensitive to the needs of victims and witnesses.

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<sup>13</sup> Hirsch, D., Bryan, A., Davis, A., Smith, N., Ellen, J. and Padley, M. (2013) A MINIMUM INCOME STANDARD FOR REMOTE RURAL SCOTLAND. Inverness: Highlands and Islands Enterprise. <http://www.hie.co.uk/regional-information/economic-reports-and-research/archive/a-minimum-income-standard-for-remote-rural-scotland.html>