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

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

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

The Research Group also found that:

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

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

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

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

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

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

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

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

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

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



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

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

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

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#### EFFICIENCY IN THE CIVIL JUSTICE SYSTEM

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

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

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

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Reform of Sheriff and Jury Procedure, 15 March 2013 -

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

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

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

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

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

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

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



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

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

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

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

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

Legal assistance has not always kept pace with these developments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Example 3 – Chapter 33AA Ordinary Cause Rules*

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

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

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

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



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

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

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

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

#### *Conclusion*

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

# FUNDING

## SUSTAINABLE FUNDING FOR A VALUED SERVICE

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

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

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

## RATES

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

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

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

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

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

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

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



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

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

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

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

#### UNPAID WORK - AREAS OF ROUTINE PRACTICE

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

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

#### THE DECLINE IN FUNDING FOR LEGAL ASSISTANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 2002 Lord Bonomy stated:

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

In 2009 Lord Gill stated:

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

In 2010, Sheriff Principal Bowen stated:

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

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

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

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

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

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

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

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



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

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

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

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

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

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

#### PREVIOUS RE-INVESTMENT STRATEGY

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

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

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

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

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

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

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

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



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

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

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#### IMPORTANCE OF RE-INVESTMENT

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

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

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

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

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



# THE PROPOSED SYSTEM

## RETHINKING THE FRAMEWORK

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

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

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

## CRIMINAL LEGAL ASSISTANCE

### STREAMLINED SYSTEM OF CRIMINAL LEGAL ASSISTANCE

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

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

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

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



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

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

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

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### WHAT WOULD IT COVER?

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

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

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

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

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

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

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### WHO WOULD BE ELIGIBLE?

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

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



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

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

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

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## SUMMARY WORK

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### WHAT WOULD IT COVER?

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

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

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### WHO WOULD BE ELIGIBLE?

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

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

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

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

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

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

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

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

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

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

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#### ADDITIONAL BLOCK FEES

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

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

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

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#### SOLEMN PROCEDURE

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#### WHAT WOULD IT COVER?

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

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

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#### INITIAL APPEARANCE

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

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

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#### WHO WOULD BE ELIGIBLE?

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

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

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

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#### EARLY RESOLUTION

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

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

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

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#### CASE CONTINUED – BLOCK FEE SYSTEM

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



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

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#### CASE PROCEEDS TO TRIAL

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

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#### POST-CONVICTION WORK

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

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#### APPEALS – APPEAL CERTIFICATE

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

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

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

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

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##### POST-SIFT COVER

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

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

There would be a provision for exceptional case status.

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



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#### WHO WOULD BE ELIGIBLE?

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

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

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#### EXCEPTIONAL CASE STATUS

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

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

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#### SPECIAL URGENCY

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

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

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#### CIVIL LEGAL ASSISTANCE

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

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

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

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

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

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#### SINGLE CONTINUING GRANT

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

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

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

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

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#### FINANCIAL ELIGIBILITY

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

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



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

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## THRESHOLDS

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

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

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## SUBJECT MATTER OF DISPUTE

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

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

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

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## SCOPE OF CIVIL LEGAL ASSISTANCE

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

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

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

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

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

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

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

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

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



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

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

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#### ALTERNATIVE SOURCES OF ADVICE

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

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

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#### ALTERNATIVE SOURCES OF FUNDING

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

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#### PRIVATE CLIENT OPTIONS

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



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

#### LEGAL ASSISTANCE LOANS

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

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

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

#### EXCEPTIONAL CASE STATUS

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

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

#### CHILDREN'S LEGAL ASSISTANCE

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

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

## GENERAL SYSTEM

### LATE PAYMENT OF COMMERCIAL DEBTS

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

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

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

# USE OF TECHNOLOGY

## LEGAL SERVICES IN A DIGITAL AGE

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

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

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

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

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

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



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

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

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

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

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

We broadly welcome the aim outlined in the paper:

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

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

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

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

# CONCLUSION AND CALL FOR FEEDBACK

## CONCLUSION

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

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

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

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

## HOW TO RESPOND

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



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