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**LEGAL ASSISTANCE IN SCOTLAND
FIT FOR THE 21ST CENTURY
LAW SOCIETY OF SCOTLAND
RECOMMENDATIONS**



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INTRODUCTION

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

Like all public services, legal assistance has seen budget reductions through the economic downturn. Since the financial crash, we have worked constructively with the Scottish Government and the Scottish Legal Aid Board (SLAB) on identifying areas where savings can be made. For example, we engaged constructively with the Scottish Government and SLAB to agree on savings measures introduced in 2010-11. This package of reforms was estimated to have saved around £12 million during 2011-12.¹ Similarly we have made suggestions on how savings can be made through standardising expert rates and, following our representations, SLAB introduced a preliminary cap on bar reports.

The economic position has changed and Scotland's economic recovery is now well established.² We are now anxious to ensure that legal assistance is not unduly limited through further reductions. The Law Society has a regulatory duty to promote access to justice and an independent, strong, varied and effective legal profession, and to protect and promote the public interest.³ It is in this context that we must now review the legal assistance system and ensure that it is, and can remain, fit for purpose.

The real term decline of legal assistance can be traced back much further than the economic downturn. The budget for legal assistance in 2014-15 is £132.2m, and two decades previous, in 1995, expenditure was £132.1m. Over the last two decades, the number of criminal cases has reduced, certainly, though the number of civil cases, particularly during the economic downturn, has been increasing. Over the same period, the complexity of cases has also been increasing, a notable example the right to advice at a police station following the *Cadder* decision, the ramifications of which, five years later, have still to conclude. Despite increasing complexity, many fees have remained unchanged for significant periods. The justice sector overall has kept track of inflation and other cost drivers, for instance, court fees, judicial salaries or sheriff officer charges. Legal assistance,

¹ SLAB Annual Report 2011-12

http://www.slab.org.uk/common/documents/Annual_report_2011_2012/Annual_Report_2011-2012.pdf

² Growing Scotland's Economy – Scotland aims to join Europe's best

<http://news.scotland.gov.uk/News/Growing-Scotland-s-Economy-Scotland-aims-to-join-Europe-s-best-16c1.aspx>

³ Legal Services (Scotland) Act 2010 s1

however, has not done so, and from our consultation,⁴ which was open from November 2014 to January 2015, we heard that law centres, the advice sector and other front-line services have similar challenges around funding. The fact that solicitors presently undertake legal assistance work does not mean that, long term, they will be able to do so at the rates of pay presently offered. Public funding is an issue for all frontline services, but we believe that with the high prevalence of justice problems and the social, emotional and financial cost of leaving these unresolved, investment to halt the ongoing real-terms decrease in resource is crucial.

Legal problems occur fairly commonly for people across Scotland. The Scottish Crime and Justice Survey 2012/13 shows that around one in four people (23%) had experienced a civil justice problem in the last three years; 14% of people had experienced problems with home or family living arrangements and 8% of people had experienced problems with money, finances or goods or services paid for. Overall, the majority of these problems were unresolved. Only 46% of those surveyed had managed to successfully resolve their civil justice problem.⁵

The cost to the public from unresolved legal problems can be huge and legal assistance helps to mitigate these costs. Research from the Department for Constitutional Affairs⁶ showed the scale of the cost in unmet legal need across the UK, estimated at over £3.5 billion annually. It was estimated that as a direct result of problems in other areas, more than 372,000 people lost their jobs, with lost earnings of over £2 billion, more than 1.1 million people suffer a stress-related illness serious enough to require medical assistance and more than 250,000 relationships break down. More than one million people also suffer from a serious loss of self-esteem. As the research stated, “This is accepted as being a trigger for people losing control of their lives, which can result in domestic violence, relationship breakdown and substance misuse.” In addition to the £2 billion in lost earnings, it was estimated that direct costs to Government of in excess of £1.5 billion were caused by unresolved legal problems. Unfair loss of employment was estimated to cost in excess of £200 million in unemployment benefits. Physical and mental health issues were estimated to cost in excess of £1 billion in NHS treatment. Violent behaviour was estimated to cost in excess of £300 million in police response.

The Low Commission’s evidence review of research on the economic value of legal aid and social welfare advice showed that, both within the UK and across a range of international jurisdictions, “all of the studies reviewed concluded that legal aid not only pays for itself, but also makes a significant contribution to households, local economies and reducing public expenditure.”⁷ However, the review also raised concerns over the quality of evidence in much of the available literature. Research in England and Wales by Citizens Advice has shown that for every £1 of legal aid expenditure on housing advice, the Government potentially saves £2.34; for every £1 of legal aid expenditure on debt advice, the Government potentially saves £2.98; for every £1 of legal aid expenditure on

⁴ Legal Assistance in Scotland – Fit for the 21st Century, Law Society of Scotland Discussion Paper- <http://www.lawscot.org.uk/media/409526/legal-assistance-in-scotland-discussion-paper.pdf>

⁵ Scottish Crime and Justice Survey 2012/13, Scottish Government, March 2014 (<http://www.gov.scot/Resource/0044/00447271.pdf>)

⁶ *Getting Earlier, Better Advice to Vulnerable People*, Department for Constitutional Affairs, 2006

⁷ Professor Graham Cookson and Dr Freda Mold, *The business case for social welfare advice services: An evidence review – lay summary*, 2014

benefits advice, the Government potentially saves £8.80; and for every £1 of legal aid expenditure on employment advice, the Government potentially saves £7.13.⁸

Dealing with areas such as housing, debt and employment through legal assistance was identified by a number of respondents as critical to access to justice in Scotland. We have also followed the developments in England and Wales legal assistance reform overall, including reductions in scope. The effect of these reforms has been marked, particularly for family law (which in Scotland constitutes around 60% of all grants of legal aid). We have heard of the adverse effect of removing areas from scope, the growth in unrepresented parties, the significant and additional cost of party litigants (estimated at up to 50% more expensive), the decline in referrals to mediation services because of the key role that solicitors have as gatekeepers to and advocates for these services, and the risk of miscarriage of justice. We have heard from a range of respondents and looked at the effect of changes to scope elsewhere and believe that there must be a better way.

One suggestion, from SLAB, is that the model of delivery of legal assistance requires scrutiny “to create the conditions for modern public service delivery”. The broadness of the legal assistance network in Scotland is a great asset, with around 1400 solicitors providing criminal legal assistance, 1150 providing civil, and over half the firms in Scotland registered. For a country as geographically diverse as ours, we believe that this breadth promotes access to justice. We anticipate that these numbers will reduce; SLAB also highlights in its latest annual report that application and solicitor numbers for civil work will decline as the economy improves.

There may be future debate around delivery models: one aspect of this was outlined in the Scottish Government’s White Paper, *A Sustainable Future for Legal Aid*, namely contracting, which was to be in place by 2014-15. In the most recent SLAB annual report, its Chairman outlines, “where legal aid reforms are required to deliver savings and also enhance the long term sustainability of legal aid then they must be considered, even if they are deemed radical or unpopular by business.” We do not believe that a case has been made for contracting.

Another great strength of the legal assistance system in Scotland is the way in which the budget is not fixed, but rather it is flexible to meet demand. The effect of the economic downturn on civil legal assistance has been pronounced: in 2006-07, net expenditure on civil legal assistance was £39m and in 2013-14, £47.8m. This has allowed people affected by the difficult economic conditions to find access to justice. As the economic outlook improves, we anticipate significantly fewer applications for civil assistance, with a corresponding saving to the legal aid fund. Expenditure may not return to pre-downturn levels, not least that many features of that downturn, zero hour contracts, welfare reform and the like remain, but this may alleviate financial pressure on legal assistance overall.

This paper outlines some of the ways in which we hope legal assistance can be reformed. Most respondents raised issues around funding, not just current providers. Particular areas were highlighted, for instance, police station advice work. A feature of the regulations introducing the police station duty scheme is that solicitors can only be paid for advice to their own clients if they also agree to undertake duty rota work for otherwise unrepresented clients. Where remuneration is

⁸ *Towards a Business Case for Legal Aid*, Citizens Advice, 2010

available, rates of payment are low (£11.60 per quarter hour which increases only to £15.47 per quarter hour when work is undertaken between 10 pm and 7am in the morning.)⁹ In more rural areas, for solicitors with family or care commitments, or more generally, accepting duty responsibilities is simply unsustainable. In part as a result of this requirement, the overall cost of solicitor advice to suspects at a police station (around 1378 individuals in January 2015 and around 16,000 people annually) is estimated at £330,000 annually. In England and Wales, the cost of police station advice in the last financial year was around £170m.

We have suggested a number of ways in which the justice system can be made more effective, for instance, the early resolution of cases through graduated block fees in solemn cases or a fixed fee for police station advice. We have recommended wider use of new technology, to align with the wider Scottish Government strategy on technology, improving videoconferencing, using digital recording and moving towards virtual courts. We have recommended simplification as a way to streamline legal assistance and allow businesses to be more efficient. Complexity was mentioned by a number of respondents and was also reflected in recent research by SLAB of civil legal assistance solicitors.¹⁰ Rates of satisfaction with the civil legal assistance application process were low (26% were mostly dissatisfied, 16% very dissatisfied; 31% were mostly satisfied, 7% very satisfied). The reasons given for dissatisfaction included “bureaucratic, inefficient or complex” (45 solicitors), “Board slow decision making/processing/other” (28) and “Time consuming (22). In the same research, solicitors were asked for potential improvements to the legal assistance system, and the results included increasing solicitor fees and making processes more cost-effective (37 solicitors), improving communication between SLAB and solicitors (31), improving the online system (28), reducing bureaucracy (27), improving decision-making (27), increasing eligibility (27), speeding up processes (21).

We believe that these proposals can make a better legal assistance system that provides sustainable access to justice to citizens across Scotland, ensuring that it remains fit for the 21st century.

Ian Moir, Criminal Legal Aid Convener

Mark Thorley, Civil Legal Aid Convener

**Law Society of Scotland Legal Aid Committee
May 2015**

⁹ The Advice and Assistance (Scotland) Regulations 1996 - [http://www.slab.org.uk/handbooks/Legislation%20master%20copy/wwhelp/wwhimpl/common/html/wwhelp.htm#href=AA/AA%20\(Scotland\)%20Regulations%201996.html&single=true](http://www.slab.org.uk/handbooks/Legislation%20master%20copy/wwhelp/wwhimpl/common/html/wwhelp.htm#href=AA/AA%20(Scotland)%20Regulations%201996.html&single=true)

¹⁰ *Civil Solicitors Survey 2013*, Scottish Legal Aid Board

DRIVERS FOR CHANGE AND RECOMMENDATIONS

In our discussion paper, we outline four broad areas of concern with the existing legal assistance system:

- Complexity
- Inefficiency
- Not always keeping pace with changes in the justice system
- Underfunding problems

The consultation responses broadly support the proposition that the system is overly complex, inefficient, outdated and under-funded. Some of the respondents, both solicitors and non-solicitors, point to difficulties that they have experienced working within the existing framework.

The detailed consultation responses have allowed us to consider key recommendations to improve the current arrangements. The following sections set out our recommendations. The proposals are set out under the headings of funding, technology, system, criminal legal assistance and civil legal assistance. It should be noted that there is significant overlap and the recommendations should be seen as a whole package. For example, the recommendations within the funding section should be viewed together with recommendations elsewhere.

As outlined in our discussion paper, it is important that legal assistance adapts appropriately to keep pace with developments in the justice system. The legal assistance system should not be considered in isolation from other reforms. The funding streams should reflect the steps that are required by the relevant court procedures. If taken forward, these recommendations should help to ensure that justice system changes become practical and effective.

Our recommendations on funding are at a macro level. In other areas, recommendations are structural and some are operational. It is recognised that, under each of the recommendations, there are areas of detail that will require further discussion. The recommendations are intended to offer a foundation to achieve broad consensus with justice system stakeholders.

We have carried out a full equality impact assessment. In the context of recommendations being taken forward, an overarching consideration is that of additional funding or special measures for persons with protected characteristics. For example, where the solicitor is expected to provide any necessary support, arrange for communication or interpretation services or provide any other reasonable adjustment which may be required due to a disability then funding arrangements would have to be structured to allow for this additional support. Any reform to legal assistance should be made with the Equality Act 2010 and Equality Act Codes of Practice firmly in mind.

FUNDING

INVESTMENT

We recommend that the Scottish Government makes an investment in legal assistance by allocating additional resource to the legal aid fund.

We recommend that the Scottish Government uses this additional resource to increase legal assistance rates.

In our Legal Assistance Discussion Paper we:

- Outlined the increasing disparity between legal assistance and private rates
- Explained that legal assistance rates have not been kept in line with inflation
- Highlighted the real term decline in legal assistance expenditure
- Outlined that some of the payment rates have remained static for more than 20 years
- Pointed out that there a number of areas of routine legal assistance practice where solicitors are wholly unpaid
- Discussed the difficulties for solicitors in relation to the complex and time-consuming accounting process
- Highlighted that state funding for legal assistance is recognised as being implicit in ensuring access to justice by case law and the European Convention on Human Rights (ECHR)

The consultation responses highlighted that there is general agreement and shared concern over the level of funding for the legal assistance system. Many note the level of cuts already imposed and the lack of increases to rates over the past 20 years.

Respondents point to both the social and financial benefits of protecting or investing in the legal aid fund. Respondents outline that cutting legal assistance costs will simply generate costs for the taxpayer elsewhere in the system.

We are recommending that the Scottish Government makes a financial investment in legal assistance by allocating additional resource to the legal aid fund. The financial investment should be used to increase funding for both criminal and civil legal assistance.

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.”¹¹

¹¹ Summary Criminal Legal Assistance Reform - http://www.slabs.org.uk/common/documents/profession/summarycriminal/2007/summary_justice_reform_march2008_proposals.pdf

In 2012, the Scottish Government's Social Research Group outlined that the summary justice reforms have made savings.¹² There has been no indication that the Scottish Government intends to re-invest these savings into additional fees for solicitors.

We believe that savings generated by reforms to legal assistance should be re-invested into both criminal and civil legal assistance.

We believe that legal assistance rates should increase, at least in line with inflation. In other jurisdictions, this is a standard feature.¹³ If there continues to be significant disagreement on the appropriate level of legal assistance rates, it may be that consideration should be given to the proposal of whether there could be an independent panel to determine rates.

FINANCIAL POSITION OF LEGAL AID FIRMS IN SCOTLAND

We recommend that the Law Society commissions research into the financial position of legal aid firms in Scotland.

SLAB takes the view that changes to the legal assistance spend is not a sign of inadequate funding, rather a combined consequence of:

“a significant decrease in activity in the justice system as a whole”¹⁴

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.”¹⁵

It is worth commenting on the two reasons put forward by SLAB for the real term decline.

In relation to justice system activity, the effect of the economic downturn has led to increased activity in civil legal assistance. As the economy improves, this activity is likely to reduce.¹⁶ For criminal legal assistance, figures show that the crime rate has declined over the last ten years.¹⁷ This would have had an obvious impact on legal assistance expenditure, notwithstanding an increase in criminal business in the courts in the past year. SLAB is correct in that the overall decline in activity would have contributed to, but would not have wholly accounted for, the real term decline in spend.

¹² Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure, pages 43-44

<http://www.natcen.ac.uk/media/46403/evaluation-reforms-summary-criminallegalassistance.pdf>

¹³ Ontario Legal Aid Rates - http://www.legalaid.on.ca/en/news/newsarchive/1203-26_tariffincrease.asp

¹⁴ SLAB, Response to Legal Aid Discussion Paper

¹⁵ SLAB, Response to Legal Aid Discussion Paper

http://www.slab.org.uk/common/documents/news/2015/SLAB_response_to_LSS_Discussion_paper.pdf

¹⁶ As highlighted in the SLAB Annual Report, 2013-14

http://www.slab.org.uk/common/documents/Annual_Report_2013_2014/A_-_Annual_Report_2013-14.pdf

¹⁷ Scottish Government, Criminal Justice Statistics, March 2015

<http://www.gov.scot/Resource/0047/00474572.pdf>

Clearly, another factor would have been the various reductions in legal assistance rates over the years.¹⁸

Solicitors are an integral part of the justice system. Many of the measures introduced in recent years have been cost effective from the Scottish Government's perspective. However, we believe that some of these measures have had a negative impact on solicitor firms and on access to justice. For example, it may be cost effective for the Scottish Government to expect solicitors to advise suspects at police stations and receive no remuneration at all for doing so because they are not on a duty scheme.¹⁹ However, such a system is not cost effective for solicitors or firms and not fair for solicitors or their clients.

Regarding efficiencies, our discussion paper highlights areas where legal assistance measures are undermining Scottish Government reforms to enhance the efficiency of the justice system.²⁰ These concerns are reflected in the responses to the consultation. For example, the Edinburgh Bar Association highlights that summary justice reforms are being undermined because of the "introduction of financial verification processes which have been gradually tightened" as well as a "stiffer approach to assessment for eligibility for representation at first calling."²¹

SLAB states that:

"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."²²

We wrote to SLAB querying which types of case have seen costs per case increase. We also asked whether the overall cost per case has, on average, increased in line with inflation. Prior to publication of this paper, SLAB provided some information on recent changes in costs per case. We will be considering this data in detail.

It is worth noting that a reduction of assistance grants does not necessarily mean a reduction in the workload of solicitors. We believe that cases involve more work and preparation now than ever before. If costs are increasing for cases involving time-based arrangements, that is an indication that solicitors are undertaking more work for less remuneration under fixed fee arrangements.

We lack a firm evidential base for understanding the impact that savings measures have had on legal aid firms over the years. Differences in the responses of practitioners and SLAB to the discussion paper are an example of this lack of clarity. The Society's annual Cost of Time Survey is a useful

¹⁸ Examples include the summary fee reduction from £515 to £485 and the reduction of the stipendiary magistrate fee from £515 to £390 in 2011 in addition to static payment rates in multiple areas. As outlined in our discussion paper, payment rates are not revised upwards on an annual basis, in line with inflation.

¹⁹ This is currently a feature of existing payment arrangements. For details of the scheme see: <http://www.slab.org.uk/providers/DutyPlans/PoliceStationDutyScheme/>

²⁰ Law Society of Scotland, Legal Aid Discussion Paper, November 2014, pages 17-20 -

<http://www.lawscot.org.uk/media/409526/legal-assistance-in-scotland-discussion-paper.pdf>

²¹ Edinburgh Bar Association, Response to Legal Aid Discussion Paper, Consultation Responses

²² Scottish Legal Aid Board, Response to Legal Aid Discussion Paper -

http://www.slab.org.uk/common/documents/news/2015/SLAB_response_to_LSS_Discussion_paper.pdf

benchmarking report for analysing the overall financial health of the solicitor profession.²³ However, for more targeted analysis, we recommend that the Society commissions a specific financial survey of legal aid firms and carries out research on sustainability against existing rates.

Five years after the start of the Scottish Government's savings programme, the economy, society, and the justice system are all changing. For these reasons, we believe that the time is right for the commissioning of a study of the legal assistance rates against the cost of running a legal firm. This will allow us to see the impact of measures taken to date, and provide a common understanding and grounding for future reforms.

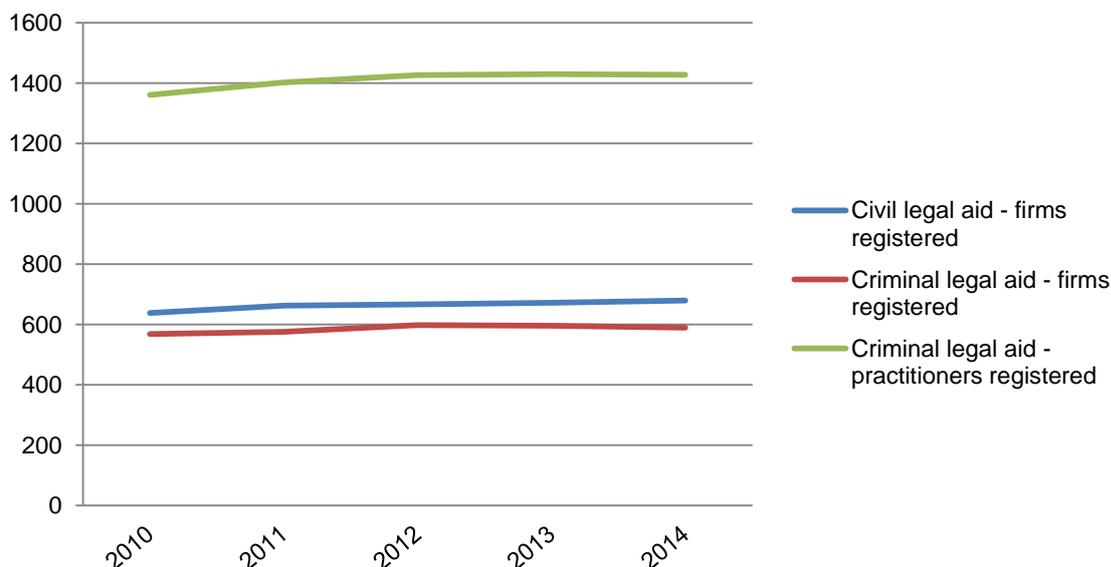
NUMBERS OF LEGAL AID FIRMS AND SOLICITORS

Inadequate funding is viewed by many respondents as creating a risk to access to justice, for example, by leading to a reduction in the number of solicitors willing to undertake the work.

Commenting on firm and solicitor numbers, the response from SLAB states:

“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 of 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.”²⁴

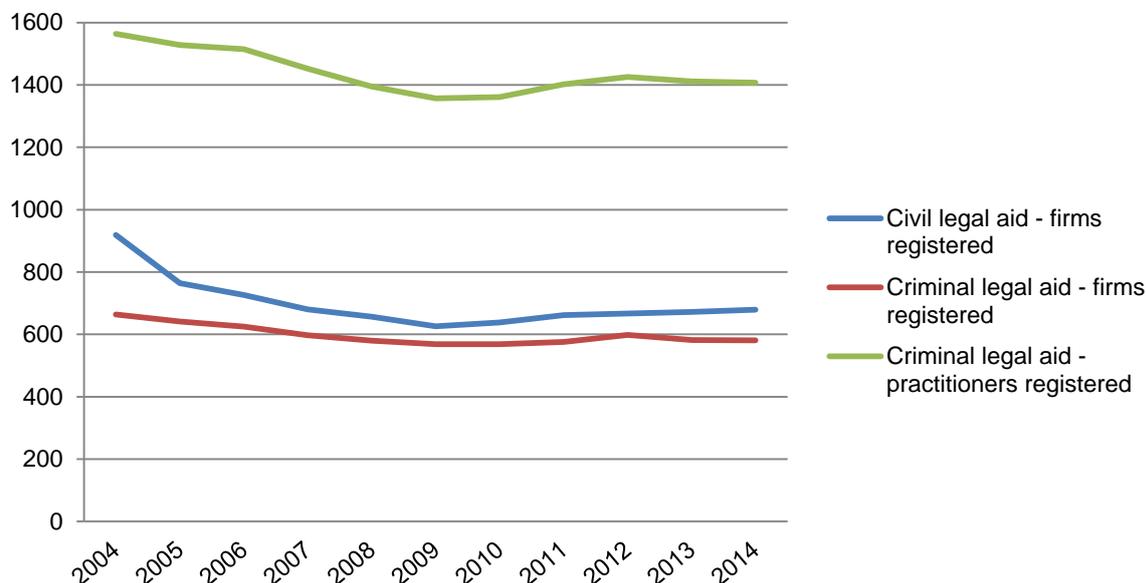
SLAB is correct that there has been a slight increase over the past six years. The trend is as follows:



²³ Law Society of Scotland, Cost of Time Survey <http://www.lawscot.org.uk/members/member-services/professional-practice/cost-of-time-survey/>

²⁴ Scottish Legal Aid Board, Response to Legal Aid Discussion Paper http://www.slab.org.uk/common/documents/news/2015/SLAB_response_to_LSS_Discussion_paper.pdf

However, what is more revealing is the trend over the past 10 years. Prior to 2004, registration levels were fairly constant, but since 2004 there has been a significant drop in numbers. The trend over the past 10 years is illustrated in the diagram below:



Overall, we can see that there has been an overall decline in registered number of firms and solicitors over the years. The slight increases in registrations in recent years might correspond to the economic downturn in those years. This does not mean that the longer-term trend has been reversed.

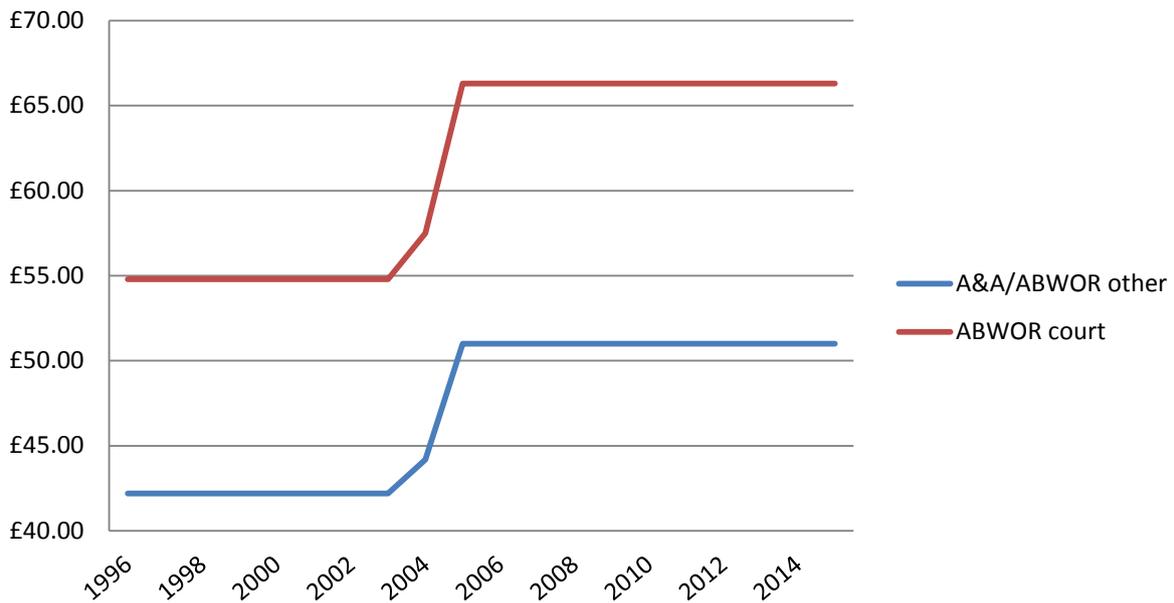
It should be borne in mind that the number of registered firms does not equate to the number of firms carrying out legal assistance work or the volume of work undertaken. Although some registered firms do a majority of their work under legal assistance, others carry out little, if any, legal assistance work and the volumes of legal assistance required by the public vary across the country.

CIVIL LEGAL ASSISTANCE FUNDING

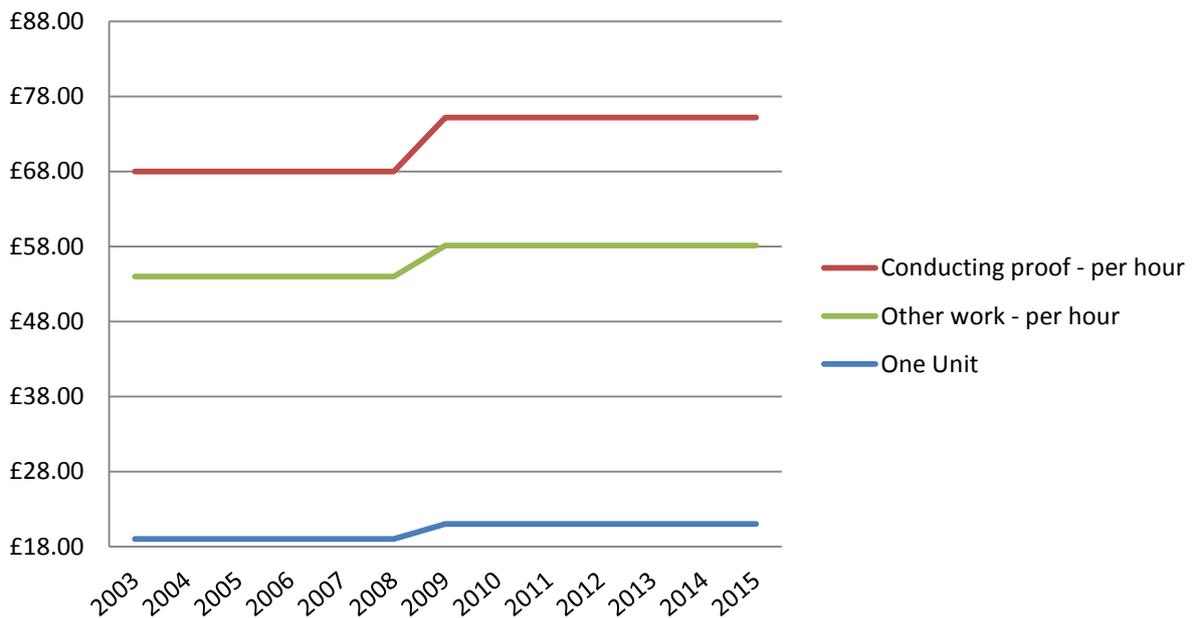
We believe that civil legal assistance is becoming unsustainable for private practitioners. When looking at the rates over the past twenty years, it is obvious that rates have stagnated. If this continues, it seems unlikely that civil legal assistance rates will be sustainable or attractive for firms to undertake.

In particular, it is difficult to envisage how Civil Advice & Assistance will continue to exist in the years ahead unless rates are increased. If the Scottish Government is not prepared to allocate additional resource to increase the rates then we believe that this work will cease altogether over the coming years.

Civil A&A - Hourly Rates



Civil Legal Aid Rates



In our discussion paper, we suggested that solicitors within advice agencies or other organisations could take on certain areas of civil legal assistance, rather than private practitioners. A number of respondents suggested that these organisations lack the capacity and resource to carry out the work. The consultation exercise has pointed to the fact that there is no safety net for people to get help for civil matters despite civil legal assistance becoming increasingly unsustainable. This highlights an urgent need for additional resource to be allocated to civil legal assistance, and for the wider advice sector to be better supported and more securely funded.

TECHNOLOGY

Our discussion paper outlined some of the ways in which new technology could help to improve the legal assistance system and access to justice overall. Improvements such as WIFI in courts, an online case portal, increased use of videoconferencing and other means can all help the justice system and legal assistance in particular.

A number of respondents to our consultation raised new technology and this is an area that we will be considering in greater detail in the coming months, including the publication of research around public-facing technology and access to justice. We are looking forward to more detail on the Scottish Government's Justice Digital Strategy,²⁵ are considering the recommendations from the recent Scottish Court Service Evidence and Procedure Review,²⁶ and are keen to explore the opportunities of a civil justice portal and of our smartcards, to enable electronic court procedures. Many of these developments involve civil cases, but with the Crown Office and Procurators Fiscal Service highlighting in its latest strategic plan "delivering paperless prosecution case presentation in summary courts initially, through the use of electronic tablets",²⁷ there may be similar opportunities for defence.

It is difficult to assess the legal assistance implications of new technological developments, though we believe that significant savings could be made, for instance, around travel through videoconferencing, or photocopying and printing through moves towards a virtual court. For the former, the Scottish Government's White Paper on legal aid²⁸ estimated savings of around £1.2m annually:

"Legal aid needs to be and is closely integrated into all aspects of Making Justice Work. In particular, the Board is leading the project studying the feasibility of greater utilisation of video conferencing in court proceedings, legal agents' prison visits and advice from solicitors at police interviews. The aim is that video conferencing will reduce the need for solicitors and others paid through legal aid to travel unless it is absolutely necessary, with a view to making savings from the legal aid fund of in excess of £1.2m by 2014-15."

We believe that effective videoconferencing could generate system efficiencies, and have asked for details around the savings to the legal aid fund in 2014-15. We are cautious around ideas that it would reduce the need for personal attendances "unless it is absolutely necessary". Particularly for clients detained, at prison or police station, we believe that it should remain within professional judgement whether face-to-face advice be provided: for instance, one of the rationales for the

²⁵ *The Digital Strategy for Justice in Scotland*, Scottish Government, August 2014
<http://www.gov.scot/Resource/0045/00458026.pdf>

²⁶ *Evidence and Procedure Review*, Scottish Court Service, March 2015
<http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>

²⁷ *Strategic Plan 2015-2018*, Crown Office and Procurator Fiscal Service, February 2015

²⁸ *A Sustainable Future for Legal Aid*, Scottish Government, October 2011
<http://www.gov.scot/Publications/2011/10/04161029/1>

Salduz case²⁹ was the ability of an independent legal professional to inspect the conditions of detention. Some types of court proceedings will lend themselves better to videoconferencing than others, for instance, criminal appeals and **we recommend that the Scottish Government carries out further research into the effectiveness of videoconferencing** over face-to-face legal services overall, building on the work carried out by Roger Smith and Alan Paterson.³⁰ An area of particular interest is around the effectiveness of expert evidence by videoconference. For particular areas of expertise, there are few qualified individuals, not just in Scotland but across the UK. We have argued for better cost controls for experts since 2010, and are interested in whether evidence could be provided more cost-effectively.

We suggested in our discussion paper that with digital recording present in courts for criminal proceedings, the use of shorthand writers paid through the legal aid fund in other proceedings be considered. Though we received only one response on this issue, **we recommend that digital recording in civil proceedings be considered.**

In an age of mobile communications, we also thought that service by sheriff officers, again at cost to the legal aid fund, merited further consideration. A simple service or intimation costs £93.72 – broadly comparable to two hours of advice at a police station under current advice and assistance arrangements – and unlike legal assistance fees, these are regularly increased.³¹ There will always remain the need for surety of service in court proceedings, though in a large number of cases, different ways of communicating with parties will be sufficient. Some solicitors have suggested that a lesser fee be available to solicitors to arrange service, for instance, electronically or simply through recorded delivery. **We recommend that the use of sheriff officers in legal assistance cases is reviewed.**

Our discussion paper considered electronic portals for solicitors and for the public. For the former, we considered the bulk processing arrangements in England and Wales a useful model, and will be discussing possible options for electronic submission and case management with Scottish Court Service. For the latter, interactive systems for the public to access justice are part of the Justice Digital Strategy, with this element to be implemented by 2017. Our research later this year on public-facing technology and access to justice will provide more detail on these and developments internationally.

Last, through our consultation process we heard very positive feedback around Legal Aid Online. We hope that the implementation of WIFI in courts will allow for easier access to the system. Appreciating the challenges of connectivity in traditional and often listed court buildings, we are not looking for building-wide access, simply reliable hotspots that can provide access to the number of court practitioners that courts see at peak times.

²⁹ (*Application no. 36391/02*), 2008

³⁰ *Face-to-face legal services and their alternatives: global lessons from the digital revolution*, Roger Smith and Alan Paterson, November 2013 (http://www.strath.ac.uk/media/faculties/hass/law/cpls/Face_to_Face.pdf)

³¹ Act of Sederunt (Fees of Sheriff Officers) 2013

SYSTEM RECOMMENDATIONS

LOBBYING

Many written responses and discussions with members suggested the need for the Society to take a leading role in promoting the importance of the solicitor profession and legal assistance, both to the public and to politicians.

Many responses are strongly opposed to the fact that the discussion paper appears to show the Society accepting that cuts will be made. It is felt by some that this is the wrong approach for the Society to be taking, and that much more needs to be done to try to influence political opinion and argue for legal assistance to be properly valued and supported, by the public and the Government. There are calls for the Society to work with other justice sector and advice organisations, to influence Government and public opinion.

We agree that there is much to be gained by coordinating a positive message around publicly funded advice, and legal aid solicitors. In particular, it is increasingly important to ensure that the legal profession works together with other organisations and agencies across civic Scotland. We have many common aims and shared issues.

We recommend that the Law Society increases the level of engagement, both with MSPs and wider civic Scotland, to raise awareness of the issues surrounding legal assistance and the importance of legal assistance to the justice system and society.

In particular, it is important to build on the common ground that we share with other organisations involved in supporting the justice system and vulnerable members of society. Many of these organisations responded to the discussion paper, and it is clear that we have many shared issues and goals around publicly funded advice and an efficient and properly functioning justice system. The impact and influence that can be achieved by working together with other organisations is greater than what we could do on our own. These other organisations help to provide important detail from different perspectives.

LATE PAYMENT OF COMMERCIAL DEBTS

We remain of the opinion that Directive 2011/7/EU on Combating Late Payment in Commercial Transactions, which provides for interest on and compensation for late payments in commercial transactions, is not currently being properly implemented in Scotland.

We recommend that the Scottish Government makes the necessary legislative changes to the Late Payment of Commercial Debts (Scotland) Act 1998 to ensure that payments to solicitors under legal assistance are subject to late payment interest and compensation payments.

We further recommend that, in the interim, SLAB adjusts its target payment times to no more than 30 calendar days (rather than working days) after receipt of a solicitor's account to reflect the requirements for timely payment.

CRIMINAL RECOMMENDATIONS

POLICE STATION ADVICE

We recommend that the Scottish Government reviews the funding arrangements for solicitors carrying out police station advice as a matter of urgency.

We recommend that the Scottish Government introduces a system of block fees, payable to solicitors for providing police station advice.

“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 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.”

The Support for Offenders with Learning Disabilities Network, Consultation Response

There are around 22,000 people requesting advice at a police station each year.³² Changes to be made through the Criminal Justice (Scotland) Bill could see this number double or even treble.³³ Many of these people are in a vulnerable or in a disadvantaged position so the presence of a legal representative is very important.³⁴

Following the judgement in *Cadder v HMA*,³⁵ Scots Law recognised that a suspect must have the opportunity to consult a solicitor before being questioned in relation to a criminal allegation. The day following the *Cadder* judgement, emergency legislation, 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 provisions. Instead, the existing advice and assistance (A&A) payment arrangements were adopted to fund the work of solicitors. However, A&A provisions were not designed for police station advice and the funding arrangements are not fit for purpose.

The existing determinations of, and checks on the levels of, contributions create serious problems.

As outlined in the response from the Edinburgh Bar Association: “accused persons will never have financial documents to hand at the time.”³⁶ We believe that it is important that legal assistance supports the principle that all detained suspects should have equal access to legal advice. This is also

³² Scottish Legal Aid Board – Police Station Duty Scheme Update

http://slab.kraya.net/common/documents/news/2015/Police_Station_Duty_Update_16th_March_2015.pdf

³³ Financial Memorandum to the Criminal Justice (Scotland) Bill provides data on estimated additional take-up-

[http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-en.pdf)

³⁴ John Scott QC, Detention without access to a lawyer ends in Scotland, The Guardian -

<http://www.theguardian.com/law/2010/oct/27/detention-without-access-lawyer-scotland-ends>

³⁵ UKSC [2010] 43

³⁶ Edinburgh Bar Association, Consultation Response to Legal Aid Discussion Paper

important in terms of ensuring that Scottish criminal law and practice remains compliant with the rights set out in ECHR.³⁷

The responses support the proposal that advice for suspects at interviews should be a non-means tested benefit. We believe that suspects detained at the police station should be entitled to free legal advice from a solicitor.

Lord Bonomy's Report on the Post-corroboration Safeguards Review states:

“Requiring persons present in a police office as suspects to pay a contribution towards legal advice and assistance (and that possibility is specifically stated in the Letter of Rights given to suspects) is likely to dissuade some from taking up the right to legal advice.”³⁸

We have consistently argued that contributions should be removed from cases involving police station advice. During discussions on the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, the Scottish Government agreed that clients would not be required to contribute towards advice and assistance given in connection with police station interviews. We do not believe that implementation of the wider contributions system should have any bearing on section 17 of the Act, which enables Scottish Ministers to dis-apply the requirement to obtain contributions from persons held for police questioning.

Whilst we would welcome the removal of contributions from police station advice cases there are serious problems in the existing payment mechanism itself. For example, A&A payment rates are low and do not adequately remunerate solicitors for the work involved in advising clients at police stations.³⁹ The rates do not 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 out-of-office hours often involved in attendance. The rates do not reflect that firms require appropriate staffing levels for 24/7/365 staff cover or that firms have to ensure there are appropriate systems and infrastructure in place to travel to police stations, communicate with the SLAB helpline and submit forms online.

There is also a significant level of bureaucracy involved in the A&A payment mechanism which involves time-recording and the submission of accounts for payment. The administrative burden involved in obtaining SLAB sanction for the necessary authorised increases in the A&A grant and subsequent time-recording for the account incurs time and cost of solicitors and SLAB staff.

All of the consultation responses that mention the issue of police station work state that funding arrangements should be reformed. The consultation responses also reflect the desire to simplify the

³⁷ Article 6 of the ECHR guarantees the right to a fair trial. 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: *Bertuzzi v. France*, Judgment of February 13, 2003

³⁸ The Post Corroboration Safeguards Review, Final Report April 2015 - <http://www.gov.scot/Resource/0047/00475400.pdf>

³⁹ Rates are currently £11.60 per quarter hour which increases only to £15.47 per quarter hour when work is undertaken between 10pm and 7am - The Advice and Assistance (Scotland) Regulations 1996 [http://www.slab.org.uk/handbooks/Legislation%20master%20copy/wwhelp/wwhimpl/common/html/wwhelp.htm#href=AA/AA%20\(Scotland\)%20Regulations%201996.html&single=true](http://www.slab.org.uk/handbooks/Legislation%20master%20copy/wwhelp/wwhimpl/common/html/wwhelp.htm#href=AA/AA%20(Scotland)%20Regulations%201996.html&single=true)

system and reduce bureaucracy. To summarise, the existing payment mechanisms under A&A arrangements are inadequate as they:

- Require suspects to pay a contribution towards their legal advice and assistance
- Do not appropriately remunerate solicitors for the work done
- Do not facilitate early resolution
- Create additional bureaucracy and administration costs

On 6 August 2013, SLAB issued an update to solicitors which stated:

“At present, police station advice is paid for under Advice and Assistance. The Scottish Government’s intention was always to review the payment mechanism as part of the work on the Criminal Justice (Scotland) Bill 2013.”⁴⁰

We would welcome the review and would encourage it to take place as soon as possible so that existing payment arrangements can be improved. We would be keen to engage with the Scottish Government and SLAB on this issue.

RECOMMENDED STRUCTURE

The most efficient framework for providing suspects with free legal advice is through a system of block fees, automatically payable to the solicitor on completion of the work, regardless of the financial circumstances of the suspect.

The block fees should be structured as follows:

- Where a solicitor is required to personally attend to advise a detained suspect the solicitor should be paid “block fee 1” (see flow chart below).
- Where a solicitor is required to provide telephone advice to a detained suspect the solicitor should be paid “block fee 2” (see flow chart below).
- Where the solicitor provides telephone or personal attendance advice and there are exceptional circumstances arising (e.g. where the interview lasts more than a certain period) the solicitor should be entitled to exceptional case funding to ensure he or she receives appropriate remuneration.

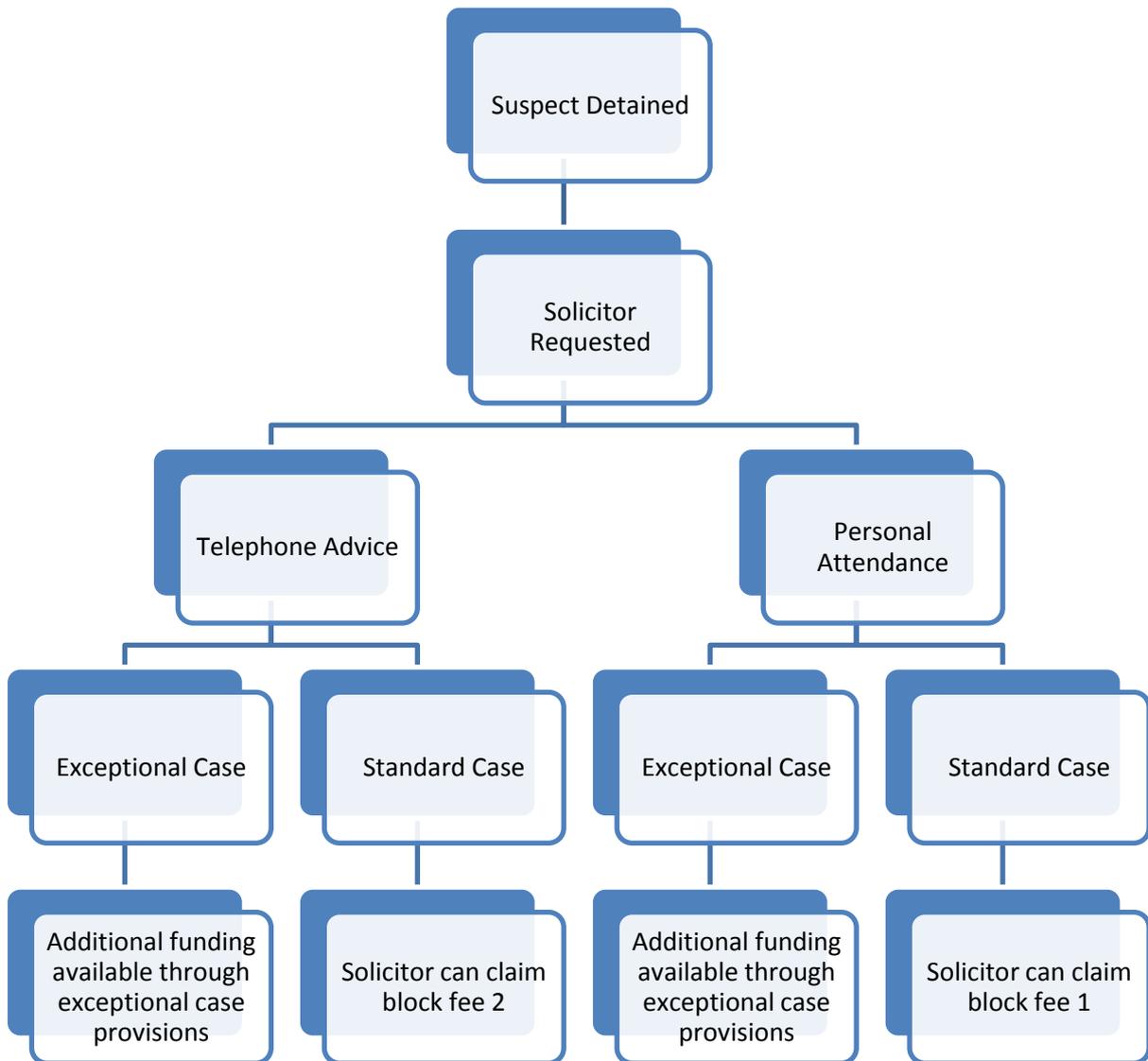
The attendance block fee should be set at a rate which appropriately reflects the important role of the solicitor during the interview to represent, protect and advance the legal interest and rights of the suspect as well as the length of time spent at the interviews, often out-with office hours.

This additional work cannot be undertaken effectively within existing business structures. In this regard, the block fee also needs to reflect that solicitors have to ensure adequate staffing levels so

⁴⁰ SLAB Update 6 August 2013 -

http://www.slab.org.uk/providers/mailshots/2013_Jun_to_Dec/newsfeed/Police_Station_Duty_solicitorsx_attendance_at_police_stations

that there is sufficient availability of staff cover 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. To illustrate the structure by way of flowchart, we recommend that the block fee system for police station advice is structured as follows:



COST ANALYSIS

There is an unavoidable cost to ensuring that detained suspects have practical, effective and equal access to legal advice and that Scottish criminal law and practice remains compliant with the rights set out in ECHR. The additional cost to the fund of introducing block fees is dependent on the number of suspects requiring advice, the ratio of personal attendance to telephone advice and the

level of the block fees. We have carried out a cost analysis which will help inform our future discussions.

In 2010, Justice, the human rights and law reform organisation reported that the presence of a lawyer:

“allows the case to be put properly to the investigating officer as early as possible, at what is in most cases the most crucial part of any potential prosecution.”⁴¹

In this regard, encouraging attendance at police station interviews through appropriate funding arrangements for police station advice could help to resolve matters early and could see a reduction in the number of cases proceeding to the court stage.⁴² The level of reduction is difficult to quantify but it could, at least, provide some system savings which would help offset some of the cost of the block fee system.

SUMMARY WORK

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

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

Victim Support Scotland, Consultation Response

There is extensive agreement amongst respondents that the system is overly complex and could benefit from being simplified.

In order to minimise the complexities of the existing system, we believe that funding arrangements in relation to summary crime should be harmonised and streamlined as much as possible. This would mean replacing the existing advice and assistance, ABWOR and legal aid systems with a single framework of legal assistance, underpinned by a set of block fees.

RECOMMENDED STRUCTURE

On behalf of the accused person, the solicitor would apply to SLAB for criminal legal assistance. The granting of the application would be subject to a financial eligibility and interests of justice test. This initial application would be the only time that financial verification would be required during the

⁴¹ Justice Briefing on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill - <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/JUSTICE-briefing-Criminal-Procedure-Bill.pdf>

⁴² The Justice Report also states that the presence of a lawyer gives the detained person the opportunity to seek bail, or an alternative to prosecution where this is appropriate.

case.⁴³ Ensuring that there is only one point in a case where eligibility is checked will simplify the procedure for SLAB, solicitors and clients and will assist with the processing of the case through the courts system.

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

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

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

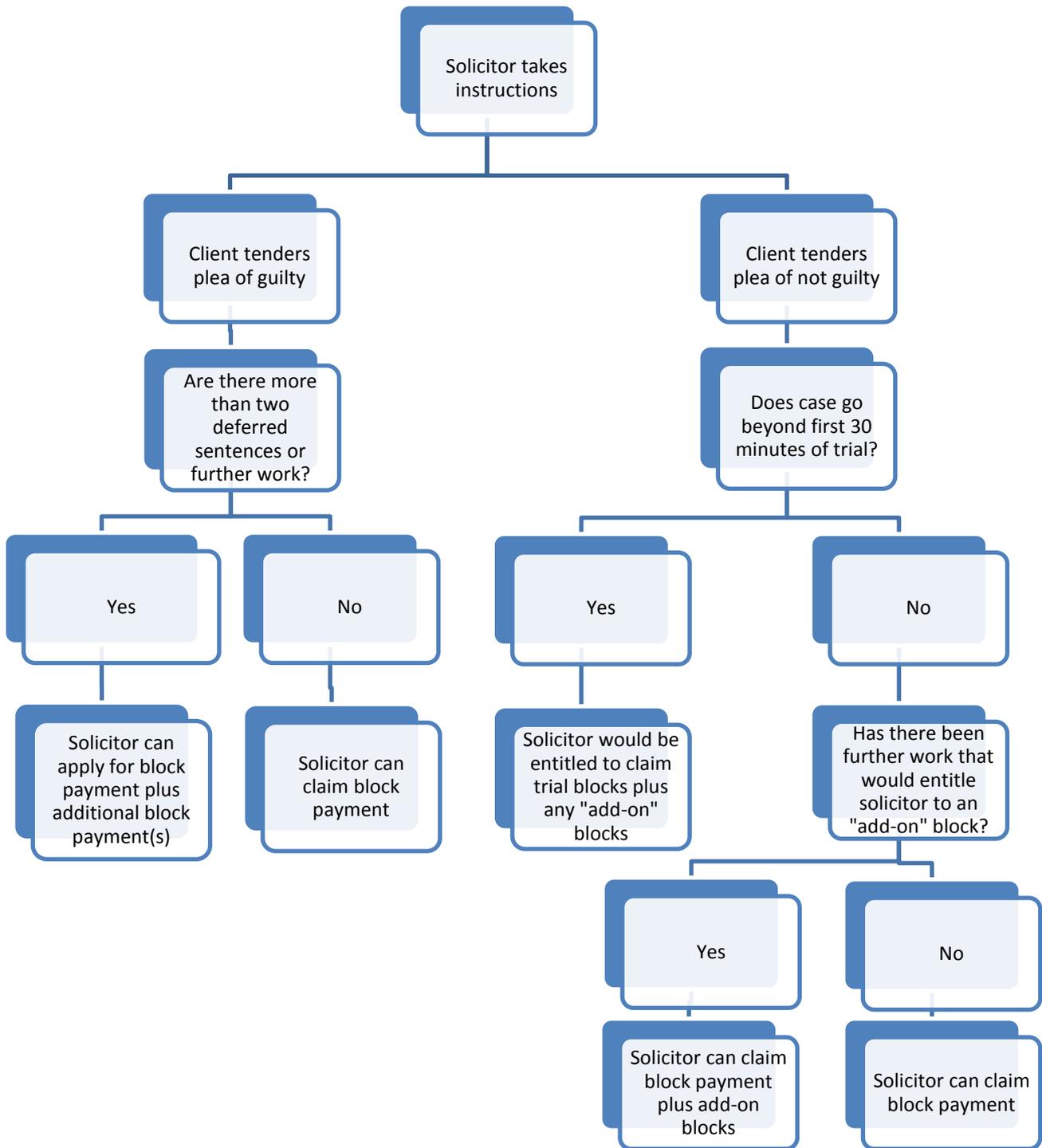
A system of additional block fixed fees could be used to cover the work of the solicitor at trials, bail appeals, further deferred sentences or the obtaining of expert reports.

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

- Parole board hearings;
- Drug Testing and Treatment Order hearings;
- Proofs in mitigation;
- Breaches of court orders;
- Proofs of breaches of court orders; and
- Proceeds of crime

Within the structure, it is recommended that, where there are exceptional circumstances in a case, the solicitor would be able to charge for work under a time-based system. We are recommending this broad structure for criminal legal assistance in summary criminal matters. It is recognised that there are areas of detail that will require further discussion, but this structure should offer a starting point for simplifying the legal assistance system for summary crime.

⁴³ 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, as under existing arrangements, any false declaration would carry a criminal penalty.



COST ANALYSIS

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

The key difference in the alternative structure is in the fresh approach to the administration of the system. The proposal could help to make administrative savings in ensuring that the application and

granting processes are harmonised across all summary work. There could also be administrative savings in achieving simplicity through an easily administered block fee system.

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

SOLEMN WORK

We recommend that the Scottish Government takes steps to re-structure solemn fee arrangements so that the solicitor receives an appropriate level of fee for achieving effective and efficient resolution of a case.

“Section 76 hearings are a far more efficient way of resolving cases for the criminal justice system than a plea at First Diet.”

Crown Office and Procurator Fiscal Service, Consultation Response

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

The fee for preparation for a hearing under section 76 of the 1995 Act (procedure where accused decides to plead guilty) is provided for in regulations.⁴⁴ The fee for preparation for the hearing is £38.⁴⁵ The fee for appearance of Counsel at the hearing is £1,250.⁴⁶ Generally speaking, the solicitor will have carried out all of the work to get the case and the client to the point of a plea. The absence of an early disposal fee at a suitable level means that there is no financial incentive to resolve matters early where appropriate. An early resolution fee is essential to support the cost effectiveness and efficiency of the wider criminal justice system.

We believe that, in order to support investigation and preparation of cases to facilitate their resolution at the earliest possible stage, fees should be structured so that the solicitor receives an early resolution fee. Such an approach would support the cost effectiveness and efficiency of the wider criminal justice system and would give practical effect to the justice system reforms.⁴⁷

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

⁴⁴ The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 as amended by the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013

⁴⁵ <http://www.legislation.gov.uk/ssi/2013/320/regulation/6/made>

⁴⁶ The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 - <http://www.slab.org.uk/handbooks/Legislation%20master%20copy/wwwhelp/wwwimpl/common/html/wwwhelp.htm#href=Criminal/Criminal%20fees%201989.html&single=true>

⁴⁷ For example, the approach would support Section 66 of the Criminal Justice (Scotland) Bill [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd.pdf)

RECOMMENDED STRUCTURE

Following the first appearance, in order to facilitate case resolution at the earliest possible stage, fees should be structured so that the solicitor receives an early resolution fee for achieving a resolution by way of a section 76 hearing or at the first preliminary hearing. There should also be a set of block fees for each further diet or continuation, but the number or the level of subsequent blocks available would reduce as the case progresses. The sliding scale would provide an incentive to try and resolve cases at an early stage. There should also be add-on block fees to cover work in preparing paper productions and witness statements.

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

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

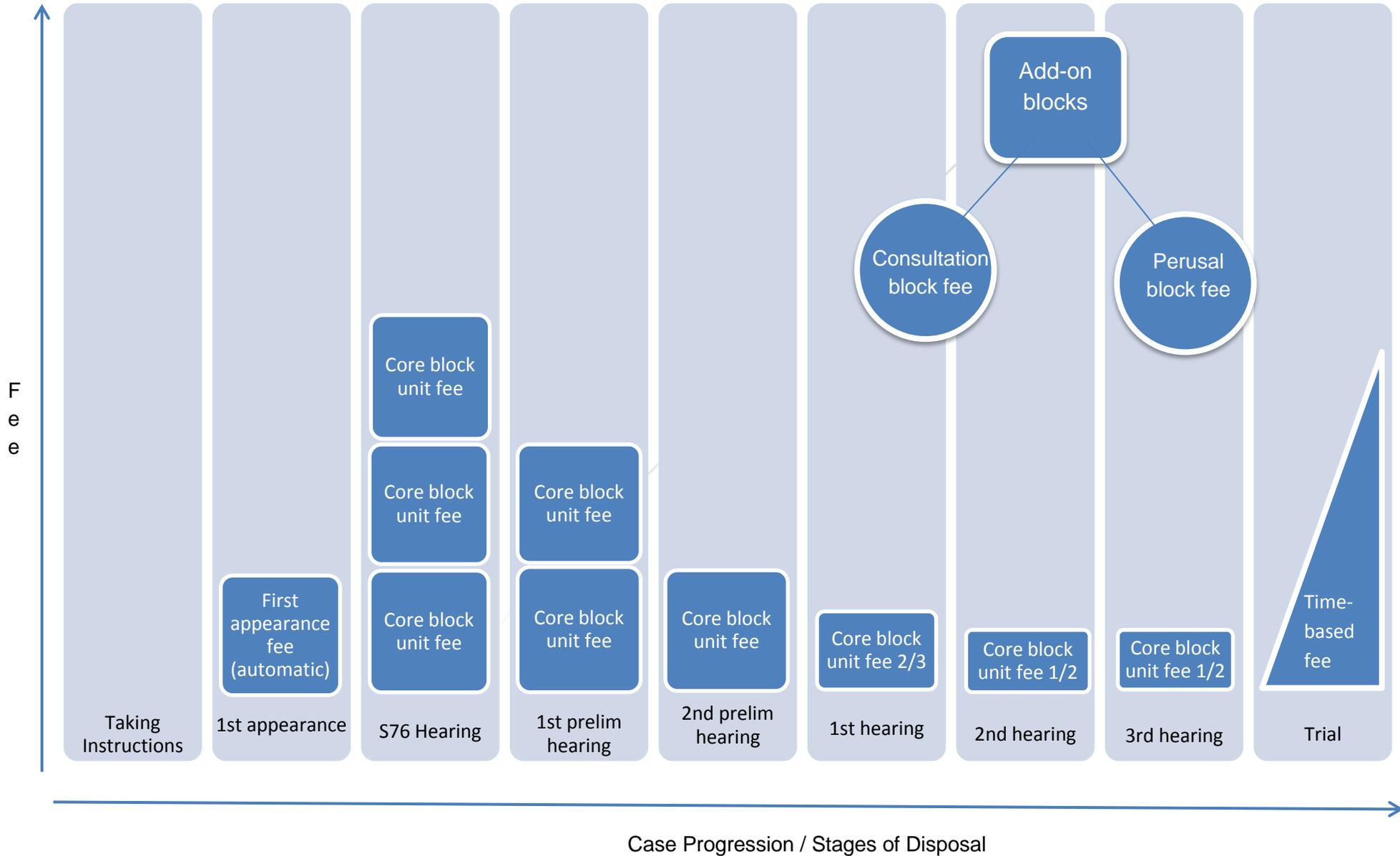
The feeing structure could be as follows:

- S.76 hearing - block fee paid to the solicitor. The fee chargeable for achieving resolution by way of S.76 hearing consists of three core unit blocks:
(core block unit fee x 3)
- Resolution at First Preliminary Hearing – The fee chargeable for achieving resolution at the first preliminary consists of two core unit blocks:
(core block unit fee x 2)
- Resolution at Subsequent Preliminary Hearing – The fee chargeable for achieving resolution at subsequent preliminary hearings consists of one core block unit
(core block unit fee)
- First hearing - the fee for resolution at a first hearing would be two thirds of the core unit block
(two thirds of the core block unit fee)
- Second hearing – the fee for resolution at a second hearing would be half of the core unit block
(half of the core block unit fee)

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

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

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



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

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

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

COST ANALYSIS

The cost of solemn legal aid in 2013/14 was £41.7 million.⁴⁸ It is not straightforward to estimate the potential change in expenditure under the recommended solemn block fee system but it should be kept in mind that the proposal is predicated on an overall increase in funding (see the funding section above). In the context of the recommendation being taken forward, it should be with an aim to increase expenditure in this area but also to drive efficiencies in order to generate substantial savings in the wider justice system. Ensuring that any changes are made with a view to an overall increase in fees is critical given the significant amount of work involved in solemn cases as well as the nature and the complexity of cases.

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

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

⁴⁸ Scottish Legal Aid Board Annual Report 2013-14 -

http://www.slab.org.uk/common/documents/Annual_Report_2013_2014/A_-_Annual_Report_2013-14.pdf

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

In terms of savings to the taxpayer, we believe that the recommendation would make substantial savings across the justice system. Early resolution means that fewer victim and witness citations would need to be issued, facilitated by cases being dealt with at the earliest possible stage and more effective preparation resulting in fewer adjournments. It would also mean a reduction in the costs for trial preparation for cases that do not go to trial.

Early resolution also supports the efficiency of the wider criminal justice system and would reduce court delays.

The summary justice reforms introduced an early resolution fee for summary matters. These reforms generated significant savings in criminal legal assistance and dealt with other problems in the wider justice system such as reducing court delays. The summary justice reforms provide useful indicators that re-structuring of legal assistance can be successful in achieving early resolution. Annual expenditure on summary criminal legal assistance reduced following the summary justice reforms.⁴⁹ There were also enhanced efficiencies for the wider justice system.⁵⁰ We believe that the improved efficiencies in summary matters can be replicated in solemn cases, creating substantial justice system savings.

CRIMINAL APPEALS WORK

We recommend that the Scottish Government reviews the funding structures for criminal appeals to ensure funding arrangements support existing court practices and procedures.

In recent years, there have been changes to court procedures for criminal appeals, which were not immediately reflected in legal assistance arrangements.

⁴⁹ SLAB Annual Report 2011-12

http://www.slab.org.uk/common/documents/Annual_report_2011_2012/Annual_Report_2011-2012.pdf

⁵⁰ Nat Cen Social Research <http://www.natcen.ac.uk/our-research/research/evaluation-of-the-reforms-to-summary-criminal-legal-assistance-and-disclosure/>

Recently, a new regime for criminal appeals became effective on 13 April 2015. The SLAB update of 24 March sets out the changes in their guidance. The changes outline where A&A or legal aid is available at each stage of an appeal.⁵¹

The SLAB guidance sets out the processes for dealing with applications to intimate and conduct criminal appeals either within the statutory timescales, or where a “late appeal” is being considered. The guidance also covers applications to the Supreme Court including applications for permission to appeal to the Supreme Court.

However, some of these changes could have been considered in the context of earlier reforms to court procedures.⁵²

We believe that it is important to consider appeals procedures in the context of legal assistance, particularly in relation to the recent justice reforms. The new national Sheriff Appeal Court could have significant implications for legal assistance.⁵³ There are a number of issues which will require to be considered carefully.

It is important that legal assistance adapts appropriately to keep pace with developments in the justice system. We recommend that the Scottish Government undertakes a full review of legal assistance in relation to work for criminal appeals to ensure that nobody is deterred from exercising their legitimate right of appeal because of lack of funding. The review should be carried out against the backdrop of current court procedures and potential changes to the procedures to ensure funding arrangements support existing and evolving court practices.

⁵¹ SLAB Update of 24 March - <http://www.slab.org.uk/providers/mailshots/newsfeed/Appeals>

⁵² For example, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 changed court procedures so that grounds of appeal now have to be submitted with the application to extend the time limit: Section 5(2) of the 2010 Act <http://www.legislation.gov.uk/asp/2010/15/section/5>

⁵³ The Sheriff Appeal Court was introduced by the Courts Reform (Scotland) Act 2014 - <http://www.legislation.gov.uk/asp/2014/18/contents/enacted>

CIVIL RECOMMENDATIONS

SCOPE

A significant number of responses addressed the suggestion that certain areas of work could be removed from the scope of legal assistance. There is evidently strong feeling in support of wide scope, and the important place of legal assistance in our society.

It is clearly felt that this is a key safeguard for the most vulnerable, and that the system must be preserved.

As a result, **we do not recommend pursuing the suggestion to restrict the scope of legal assistance.**

SINGLE CONTINUING GRANT

In order to simplify and streamline the system, **we recommend that the current distinctions between Advice and Assistance, Assistance By Way of Representation, and Legal Aid be removed.**

By harmonising the eligibility criteria, and reducing the number of application stages, the system will be easier to understand, and less bureaucratic. This would reduce the amount of time and resource required on administration.

The appropriate level for a lower threshold will be something for the Scottish Government to consider, but we would suggest considering a figure between the current A&A and Legal Aid thresholds (£12,740 and £26,239 disposable income a year, respectively). Although this would decrease the upper limit for current grants of legal aid, it would be an increase on the current limit for A&A. This would increase the ability for people to enter the legal assistance system and receive initial advice prior to the stage at which representation in court proceedings is required. This would be compatible with an aim of early intervention, and could prevent escalation of problems, reducing the cost and impact of legal issues.

However, taking on board the potential complexities and other issues raised by some respondents, **we do not recommend taking forward the suggestion to remove the exception for subject matter in dispute when assessing financial eligibility.**

Those at the upper end of the current eligibility thresholds, who would no longer be eligible for legal assistance, should be supported to access affordable services through encouraging a range of funding options, including a 'legal aid loan' system, discussed further below.

It is evident that continuing checks will need to be made throughout the life of a case to ensure that an individual remains eligible for legal assistance and that it continues to be reasonable and appropriate to support a case through public funds.

The current mechanisms of stage reporting and requirements to report to SLAB in the event of a change in circumstances should provide adequate checks in the proposed system. It may be that the range of prompted and unprompted stage reports would need to be increased to ensure that all

relevant situations are covered, enabling SLAB to assess the appropriateness of funding on an ongoing basis.

In addition, it would be appropriate to consider a cost limit for pre-court work, and a second cost limit for court work.

We recommend that the Society enters discussions with SLAB to consider the development of a single grant system, also engaging with other organisations across the justice sector on this proposal.

ALTERNATIVE FUNDING

Civil legal assistance is currently provided subject to a sliding scale of contributions, up to 100% of the cost to the fund. In addition, provisions for clawback mean that where resources are recovered or preserved, it is likely that the cost to the fund will be payable out of those resources. So, in fact, for many individuals legal assistance functions as a sort of loan for legal services.

The cost to the legal aid fund is minimal for providing legal assistance to the upper eligibility levels, due to the high level contributions. However, we believe that it would be more transparent to create a legal aid loan administered by SLAB.

In addition, providing a loan for legal services, rather than admitting someone for legal assistance, would reduce the administrative burden for both SLAB and solicitors by removing the involvement of SLAB between the assessment/application phase and the collection phase. This would enable the client and solicitor the freedom to run the case by agreement, within the level of funding that SLAB assessed as reasonable to provide. The administrative burden of assessment and collection should be comparable to the current eligibility assessment and collection of contributions for legal assistance.

This proposal would see the provision of affordable loans by SLAB to those currently at the upper end of the eligibility scale, providing a fair and affordable way for individuals with moderate levels of disposable income to access legal advice and assistance.

If the scope of the scheme were broader than that of legal assistance, the availability of legal aid loans may provide an additional access to justice benefit by providing a means for those with cases that may be difficult to obtain legal assistance for – for example, defamation actions, or representation at tribunals – to be found.

Concerns were raised in response to this proposal in the discussion paper, in particular around the possibility of requiring individuals to take on personal debt to be able to access legal services, particularly when those individuals may be financially or socially vulnerable, and may in fact be seeking advice on debt. However, by retaining the full scope of legal assistance, and targeting this funding option at the current upper limit of eligibility, this should not be a significant risk. Ensuring that any financial assessment accurately captures liabilities as well as assets could help in this regard. Those accessing these loans would be those who are currently paying very high contributions, up to 100%. If an individual was in a low disposable income and capital situation, it is

likely that they would remain eligible for legal assistance. The loans would be publicly backed to ensure they were fair and affordable. Any profit generated through interest or fees would be re-invested into the legal assistance and legal aid loan systems. In the context of the need to ensure that public funds are targeted at the most vulnerable and least able to support themselves, it is felt that this proposal would ensure that everyone remained able to access affordable legal services.

In addition to providing financial assistance, a legal aid loan scheme could also provide an opportunity to link individuals to other sources of support to address any wider or underlying issues that may be present. This is a model used, for example, by the UK Government's Start Up Loans programme, which provides funding to new businesses as well as free business planning support and mentoring.

We recommend that the Scottish Government considers developing a legal aid loan to individuals requiring some level of financial support to access legal services. This would also involve consideration of any appropriate limits to scope or upper financial eligibility in defining the extent of the scheme.

ALTERNATIVE SOURCES OF ADVICE

It is clear that solicitors and other advisors play an important role in facilitating access to justice, and helping vulnerable members of our society in a wide range of circumstances. Respondents emphasised the need for solicitors and third sector agencies to work together, to ensure the right advice at the right level.

We agree that advice from a solicitor will sometimes be the appropriate level, and when that is the case, it is crucial that an individual can get that advice at a rate they can afford, free if necessary. However, we do also believe that the traditional firm model will not always be the best structure for everyone. Solicitors already work within the third sector and law clinics providing this advice directly and alongside other services. We recommend strengthening these models to make sure that solicitors are able to continue to play this role within the advice sector, and that specialist legal advice is delivered in an accessible way.

There were significant concerns raised around the advice sector's sustainability – lack of certainty and long term funding together with increasing workloads are putting the sector under strain. There was concern over moving away from a case-by-case legal assistance funding model for advice agencies that undertake legal assistance work – threats to independence, reduced certainty, and risks around common tendering models were all raised as issues with moving towards a grant based system.

We recommend that the Law Society and advice sector work together to ensure that funding, both for legal assistance and other advice services, is provided in such a way as to generate certainty and confidence in the system, and remunerate those providing the service at a sustainable rate. This will factor into the lobbying recommendation above.

We also recommend that the Law Society and advice sector carry out further investigation into the possibilities of further integrating solicitors into the work of the third sector, to enable high quality and specialist legal advice to be delivered to those most in need.

CONCLUSION

It is clear that Scotland's system of legal assistance is a matter of pride for many. Ensuring that all those who require help from a solicitor, whether for civil or criminal matters, can access that support is crucial for a fair society and a properly functioning justice system.

However, the current legal assistance system is not fit for purpose. Since its establishment in 1986, there have been many changes to the justice system and to wider society, and it is time to take a fresh look at how we can ensure a sustainable system for the future. In the context of court reforms, changes in crime rates and prosecution policy, budgetary pressures, and more, we believe that it is possible to improve the system.

This paper is the outcome of a discussion process with over fifty respondents from a wide range of organisations providing perspectives from across the justice sector. We aimed to generate a discussion about legal assistance, and are pleased to see that this has happened. The recommendations in this paper are now a starting point for a much longer-term piece of work – to improve the links between all those with an interest in the legal assistance system, and to improve that system itself to best serve the needs of our society.

We continue to welcome feedback and discussion on this and other elements of the Society's work around legal assistance.

To contact the Legal Aid Committee, please email legalaid@lawscot.org.uk

APPENDIX

Table of Key Recommendations

Funding Recommendations	
We recommend that:	
1.	The Scottish Government makes an investment in legal assistance by allocating additional resource to the legal aid fund.
2.	The Scottish Government uses this additional resource to increase legal assistance rates.
3.	The Law Society commissions research into the financial position of legal aid firms in Scotland.
Technology Recommendations	
We recommend that:	
4.	Further research is carried out by the Scottish Government into the effectiveness of videoconferencing.
5.	The Scottish Government and Scottish Court Service consider the use of digital recording technology to replace shorthand writers in civil proceedings.
6.	The Scottish Government reviews the use of sheriff officers in legal assistance cases.
System Recommendations	
We recommend that:	
7.	The Law Society increases the level of engagement, both with MSPs and wider civic Scotland, to raise awareness of the issues surrounding legal assistance and the importance of legal assistance to the justice system and society.
8.	The Scottish Government makes the necessary legislative changes to the Late Payment of Commercial Debts (Scotland) Act 1998.
9.	Until the Scottish Government makes the necessary legislative changes to the Late Payment of Commercial Debts (Scotland) Act 1998, SLAB adjusts its target payment times to no more than 30 calendar days.

Criminal Recommendations

We recommend that:

10.	The Scottish Government reviews existing funding arrangements for solicitors carrying out police station work as a matter of urgency.
11.	The Scottish Government introduces a system of block fees, payable to solicitors for providing police station advice.
12.	The Scottish Government explores harmonising and streamlining, as much as possible, all funding arrangements in relation to summary crime.
13.	The Scottish Government takes steps to re-structure solemn fee arrangements so that the solicitor receives an appropriate level of fee for achieving effective and efficient resolution of a case.
14.	The Scottish Government reviews the funding structures for criminal appeals to ensure funding arrangements support existing court practices and procedures.

Civil Recommendations

We recommend that:

15.	The Society enters discussions with SLAB and the advice sector to consider the development of a single grant system, removing current distinctions between Advice and Assistance, Assistance By Way of Representation, and Legal Aid.
16.	The Scottish Government considers developing a legal aid loan to individuals requiring some level of financial support to access legal services.
17.	The Law Society and advice sector work together to ensure that funding, both for legal assistance and other advice services, is provided in such a way as to generate certainty and confidence in the system, and remunerate those providing the service at a sustainable rate.
18.	The Law Society and advice sector carry out further investigation into the possibilities of further integrating solicitors into the work of the third sector.