



Law Society
of Scotland

Legal Aid

Rethinking Legal Aid – An independent strategic
Review

The Law Society of Scotland's Response

May 2018



Introduction

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

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

Our Legal Aid Committee welcomes the opportunity to consider and respond to the report of the independent strategic review of legal aid. We have the following comments to put forward for consideration.

General comments

Rethinking Legal Aid is the first strategic overview of the legal aid system since 2004. We welcomed the review, and the report, which acknowledges the need for significant change and a new approach to legal aid in Scotland.

The report contains 67 wide-ranging recommendations divided across six overarching aims. We agree with many, but not all, of these recommendations. Many of the recommendations are made at a very high level, and considerable work will be required to develop the detail of how these changes could be made in practice, and what would be required for implementation.

A full list of the recommendations and our initial brief views is included in the annex to this paper. We have selected seven recommendations to discuss in more detail, below. If further information is required on these, or any other of the recommendations, we would be happy to provide it.

Specific recommendations

Recommendation 9: retain the current scope of legal aid

We strongly support the recommendation that the full current scope of legal aid is retained. This corresponds with our recommendation in 2015 following consultation with the profession and other legal aid stakeholders. We would also go further to suggest that extending scope in some areas would merit

consideration. For example, the review acknowledges the challenges around legal aid and tribunals, and the need to address legal aid for group actions. In addition, challenging human rights abuses at the European Court of Human Rights remains out of scope, as it is not considered a matter of Scots law.

It is important to ensure that full scope is available not just in theory, but also in practice. Without a body of providers covering the full geographic spread of Scotland, but also willing and able to provide advice and representation in the full range of legal areas in scope, the legislative scope of legal aid does not meaningfully translate into access to justice for all individuals in Scotland. As a result, the recommendations relating to fees, support for rural practitioners, and improvement of cash-flow will be important in delivering this recommendation.

Recommendation 19: outlays – preferred supplier list

We firmly support the development of an authorised supplier list for expert witnesses, a development that we have advocated for the legal aid system since 2010. Currently, outlays for expert witnesses are often significantly higher than the solicitor's fee for the conduct of a case, and these outlays have to be borne through a firm's cashflow until such stage as reimbursed by SLAB. A system where solicitors can select an expert from an authorised list of experts and have that payment made direct by SLAB will assist case preparation and firm cashflow.

We note the changes made to expert witness payment arrangements in England and Wales, with the establishment of maximum fee levels per hour, benchmark number of hours per activity and other measures. Whether or not this would be an appropriate system for Scotland, the result of these reforms in England and Wales has not seen significant difficulty in securing experts for publicly funded cases.

Professional judgment is required in the selection of an appropriate expert and managing the progress of a case and the availability of an expert witness can be challenging. We would be keen to retain, through a new system for experts, a wide choice of possible expert. We would also be keen for any system to allow, subject to appropriate sanction by SLAB, expert fees exceeding the authorised rates if shown to be necessary in the interests of justice.

Recommendation 20: a single legal aid type

We support the recommendation that there should be a single type of legal aid, simplifying the system and making it easier to understand and navigate. This would require the current separate categories of advice and assistance, assistance by way of representation, and legal aid, and children's legal aid to be consolidated. The review does not specify how it envisages this would operate. We have previously called for this form of simplification, and have suggested a model for a single continuing grant with regular reporting and communication between the solicitor and the Scottish Legal Aid Board. We believe this would

be simpler, less administratively burdensome, and more straightforward for the client as well as for the provider.

Removing the distinction between the different categories of legal aid will also require a review of the eligibility requirements. At present, there are different thresholds and tests applied for the different types of legal aid. The change to a single type of legal aid will need a single set of eligibility tests and thresholds to support it.

The appropriate level for a financial threshold will be something for the Scottish Government to consider, but we would suggest considering a figure between the current advice and assistance and legal aid thresholds. Although this would decrease the upper limit for current grants of legal aid, it would be an increase on the current limit for advice and assistance. 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.

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.

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

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

Recommendation 40: public campaign to raise awareness, and support improved morale in the profession

We recognise the finding that there is widespread low morale in the legal aid profession, and a need to improve public understanding and recognition of the vital and high quality service provided by the legal aid system. Respect for and protection of human rights and access to justice through legal aid underpins the rule of law and is one of the hallmarks of a civilised society, benefiting everyone, not just those who use the system. Access to legal advice, in particular at an early stage of a problem, provides benefits to individuals as well as to the wider community, and savings to the public purse. Our research on the social return on investment in legal aid highlighted the significant positive impact of legal aid to society, including savings of

up to £11 for every £1 spent on legal aid in housing cases, and up to £5 for every £1 spent on criminal and family cases.¹

We support the recommendation of a campaign to raise public awareness of the vital public service provided by legal aid solicitors, and will be very happy to work together with the Scottish Government and Scottish Legal Aid Board on this.

The report recognises that the issue of fees is one of the primary causes of low morale within the profession. We do not agree with the finding that there is no case for an immediate uplift in fees. Although increasing the respect and value legal aid solicitors enjoy in society would be a positive development, this alone will not address the issues surrounding morale, sustainability, and long-term attractiveness of legal aid work within the profession. Through our research into the financial health of legal aid firms in Scotland, we received a wide range of comments from legal aid solicitors on the challenges of legal aid work covering fees, bureaucracy, and structural issues.²

Recommendation 41: independent, evidence-based review of fees

We believe that the recommendations around reviewing fees are an important step forward for the legal aid system in Scotland. This system ensures access to justice for people in Scotland, and also reimburses practitioners, experts and others for the work they do to ensure this. The system which was established by the Legal Aid (Scotland) Act 1986 did not include any mechanism for periodic review. The result is that in real terms, fees are decreasing year-on-year (and this before any of the cuts implemented during the economic downturn).

We endorse the recommendation that the structure, timetable and process for this review should be agreed before the end of 2018. It should be an independent process, and it should be evidence-based. It is suggested that this fee review process should be underpinned by accounts and workload data drawn from SLAB, solicitors and advocates. “This access to accounts and workload data will be highly intrusive for private practices and will require a very wide range of trust and consent.” It is unclear why this should be so. We want to ensure that a proportionate and efficient review system is developed, one that, as the review recommends, takes place on a periodic basis and also encompasses the full range of fees.

¹ Law Society of Scotland, [Social Return on Investment in Legal Aid](#) (November 2017)

² Otterburn, [The financial health of legal aid firms in Scotland – a report for the Law Society of Scotland](#) (February 2017)

Recommendation 54: reinvestment of savings in service improvement and innovation

We believe that there are significant improvements that can be made to the legal aid system through technology, and highlighted a number of these in our response to the review and in our 2015 strategy paper. We are supportive of an approach that would allow funding for innovation and service improvement, and keen to ensure that practitioners can participate in these initiatives. We are concerned, however, at the idea that “the saving in the legal aid budget (identified earlier in the review) should be invested in service improvement and innovation within publicly-funded legal assistance.” We believe that this saving, identified at page 15 of the review as £75m over 10 years, could be better invested in sustainable frontline services.

Recommendation 57: a new arm’s length public delivery body

We do not believe that the creation of a new arm’s length public body is a helpful proposal. The proposal that responsibility for legal aid policy should be transferred from Scottish Government to a Scottish Legal Aid Authority does not promote access to justice. Ensuring human rights are protected in Scotland is a fundamental responsibility of government and a central feature of the devolved constitutional settlement. Legal aid is a mainstay of the protection of these rights and, we believe, important for Scottish Government to retain policy responsibility around.

Next steps

We welcome the opportunity to discuss further with Scottish Government the ways in which the legal aid system can be improved following the review and can provide further detail around our responses to the various recommendations if needed.

For further information, please contact:

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