



THE LAW SOCIETY
of SCOTLAND
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**LEGAL ASSISTANCE IN SCOTLAND
FIT FOR THE 21ST CENTURY
LAW SOCIETY OF SCOTLAND
CONSULTATION REPORT**



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INTRODUCTION

In November 2014, the Law Society published a discussion paper, Legal Assistance in Scotland – Fit for the 21st Century, on reform of the legal assistance system in Scotland. This was opened for feedback to all members and stakeholders until 30 January 2015.

This paper provides a summary of the responses received to date. A copy of the responses is provided in a separate appendix.

LIST OF RESPONDENTS

Only the respondents who gave permission for their responses to be published are listed below. Respondents who asked for their comments to remain confidential have not been included in this summary report.

1. Airdrie Faculty
2. Association of Personal Injury Lawyers
3. Brown, Marcus – Defence Precognition Officer
4. Brown, Paul – Legal Services Agency
5. Brown, Simon – Kilmarnock Faculty Dean
6. Busby, Nicole Professor – University of Strathclyde
7. Citizen’s Advice Bureau
8. Culley, Cliff – Culley & McAlpine
9. Crown Office and Procurator Fiscal Service
10. Cruickshank, Paul – Diploma Student
11. Edinburgh Bar Association
12. Employment Lawyers Association
13. Equality and Human Rights Commission
14. Faculty of Advocates
15. Faculty of Advocates Employment Law Group
16. Family Law Association
17. Glasgow Bar Association
18. Henderson, Duncan – Inverness Legal Services
19. Hunter, Stuart – Macnabs LLP
20. Hutcheson, Alan – Hutchesons
21. Journal of the Law Society of Scotland
22. Kelly, Gerry – Kelly & Co.
23. Kinloch, David – David Kinloch & Co.
24. Law Society of Scotland – Administrative Justice Sub-Committee
25. Law Society of Scotland – Criminal Practitioner’s Forum
26. Law Society of Scotland – Discussion Event with Stakeholders
27. Law Society of Scotland – Equalities Law Sub-Committee
28. Law Society of Scotland – Equality and Diversity Committee



29. Lockhart, Peter – Lockharts
30. McIntyre, William – Russel & Aitken LLP
31. Police Scotland
32. Pryde, John – Pryde Immigration Lawyers
33. Quinn, John – J Quinn & Co.
34. Robertson, Liam - L & G Robertson Limited
35. Scotland's Commissioner for Children and Young People
36. Scottish Association of Law Centres
37. Scottish Court Service
38. Scottish Legal Aid Board
39. Scottish Council of Voluntary Organisations (joint letter)
40. Shelter Scotland
41. Smith, Iain – Keegan Smith, SSC
42. Tait, Brian – Drummond Miller
43. Supporting Offenders with Learning Disabilities (ARC Network)
44. Together (Scottish Alliance for Children's Rights)
45. Victim Support Scotland
46. Woods, Dr Duncan – Keith Borer Consultants

SUMMARY OF RESPONSES – THE NEED FOR CHANGE

The discussion paper outlines that the existing system can be made simpler and more efficient. The paper also states that current arrangements should be reformed to bring the system up-to-date with wider justice reforms and that legal assistance should be more appropriately funded.

Therefore, these are the four key themes underpinning the need for change:

* Simplification

* Efficiency

* Modernisation

* Funding

SIMPLIFICATION

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

Examples of comments:

“The legal aid system is overly complex and in need of simplification. SLAB uses complications of the existing system to their advantage.”

(LSS Criminal Legal Aid Practitioners’ Forum)

“There is no doubt that the legal aid system is in need of a major overhaul, with both the criminal and civil systems being unnecessarily complex.”

(Simon Brown, Legal Aid Solicitor and Dean of Kilmarnock Faculty)

“I would firstly advise that the existing Scheme has become virtually unworkable. It is virtually impossible for clients to understand or comprehend its complexities.”

(Stuart Hunter, Legal Aid Solicitor)

“The Faculty would support proposals to reform the legal aid system with a view to reducing complexity and increasing efficiency. A system which is more easily understood and more easily operated would facilitate access to justice.”

(Faculty of Advocates)

The Scottish Legal Aid Board agrees that there are some complexities within the system but argues that there is not a problematic degree of complexity. SLAB states:

“SLAB agrees and has already stated that there are further opportunities for continued simplification and streamlining of the legal assistance system. Indeed, some complexities remain in place despite SLAB and Scottish Government proposals to move to simpler feeing systems.”

(Scottish Legal Aid Board)

SLAB also comments that some degree of complexity has been caused by:

“requests by the profession for the legal aid system to take account of the nuances of the wider justice system.”

(Scottish Legal Aid Board)

However, SLAB disputes that this leads to a problematic degree of complexity or confusion, citing the fact that out of 200,000 cases last year, only 18 accounts were taken to taxation.

EFFICIENCY

There is extensive agreement amongst the majority of respondents that the system is inefficient and could benefit from being streamlined in order to enhance efficiency. Inefficiency was seen to be affecting the proper running of both the legal aid system, and the wider justice system:

“Unfortunately this Association’s view is that the current legal aid system is hindering the early resolution of cases and reform is required sooner rather than later...The current system sees a to-ing and fro-ing between SLAB and the solicitor where financial information is batted backwards and forwards, often with the DWP and Crown link failing for one reason or another.”

(Edinburgh Bar Association)

“Victim Support Scotland is generally supportive of the changes proposed by the Society in reforming how criminal legal assistance is structured and administered, as we believe they can potentially contribute to improving the efficiency of the criminal justice system, in turn benefitting victims and witnesses.”

(Victim Support Scotland)

“We agree that legal aid in Scotland needs reform in order to create an effective, efficient and sustainable service, especially in the context of a sustained decrease in funds for legal aid in recent years”

(Scottish Council of Voluntary Organisations)

“Procedural reform, insofar as it removes inefficiencies and unnecessary work, may generate savings across the system, including the legal aid fund.”

(Faculty of Advocates)

The Scottish Association of Law Centres raises concerns about whether the specific suggestions in the paper will lead to enhanced simplicity and efficiency:

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

(Scottish Association of Law Centres)

MODERNISATION

Of the respondents which mention the wider justice reforms, there is universal agreement that reforms to legal assistance must be made in the context of these wider reforms, and the concept of modernisation is welcomed.

“The Faculty agrees that the legal aid system should not be considered in isolation from other reforms or potential reforms of the justice system...Reforms to court procedures may require reforms to the legal aid system, so that the funding stream reflects the steps that are required by the relevant procedures. Likewise, changes in criminal procedure – such as the requirement for police station interviews – require to be properly reflected in the payments made for work reasonably or necessarily done.”

(Faculty of Advocates)

There is also a broad level of agreement that the existing legal assistance system has not always adapted to these wider reforms and changes to policy and practice. For instance:

“It is clear that the legal assistance system has not always kept pace with changes in forensic provision and the way it is procured by police and defence.”

(Dr Duncan Woods, Keith Borer Consultants)

“The situation has been exacerbated by a move towards not guilty pleas in summary business once more, which is disappointing following the shift towards early case resolution following SJR in 2006/7.”

(Edinburgh Bar Association)

The Scottish Legal Aid Board, however, argues that the legal assistance system has successfully kept pace with wider reforms.

“Contrary to the central premise of the paper that the legal aid system has not kept pace with wider changes, the last fifteen years have been characterised by significant evolution

both of the structures and processes underpinning the traditional legal aid model and the delivery model itself”

(Scottish Legal Aid Board)

FUNDING

There is general agreement and shared concern over the level of funding for the legal aid system. Many note the level of cuts already imposed and the lack of increases to rates over the past 20 years. For example:

“there has been no increase in funding since 1995 for criminal legal aid, there have been a series of unjustified cuts and that the current legal aid rate has fallen from 90% of the solicitor's rate to about 20% of what a solicitor needs to charge.”

(Duncan Henderson, Legal Aid Solicitor)

There are, however, also some comments that Scotland's legal aid system is well funded from the international perspective, and good value for money.

Inadequate funding is viewed by many 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. Respondents also note that cutting costs in relation to advice will simply generate costs elsewhere in the system, particularly on social welfare issues. These problems are also set against a background of changes to prosecution and policing policy, including a trend towards more serious cases being dealt with in lower courts.

Many responses are strongly opposed to the fact that the discussion paper appears to show the Law 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 aid to be properly valued and supported, by the public and the Government:

“To concede the fact that cuts are needed to the legal fees aspect of the legal aid budget at all is a mistake. We should instead be pointing to the fact that services have already been cut and that the "level playing field" in terms of access to justice that is supposedly sought has already been eroded and will be eroded further by additional cuts... By continually agreeing to the principle that savings must be made we are giving an open door to whichever administration is in power to continue with the cost cutting exercise. In a recent visit to meet with the solicitors of the Airdrie Faculty, the President of the Law Society suggested that there was a choice: either we accept that cuts were coming and that we do what we can to try to dictate the narrative on that; or, we say that the Government is lying about the funds available in the legal aid pot.

It is our view that this had completely missed the third and most important option available to us which is to seek to exert political pressure upon the Scottish Government to ensure that additional funding can be found to properly fund the legal aid system Scotland.”

(Airdrie Faculty)

There are requests for the Society to campaign for increase in legal assistance rates:

“The GBA would wish the society to recommend and argue for increases in fees not only to the unit but also to block fees across all areas of work.”

(Glasgow Bar Association)

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

(William McIntyre, Legal Aid Solicitor)

Calls are also made to work together with other justice sector and advice organisations, to influence Government and public opinion. For example:

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

(The SOLD Network)

Concerns were also raised by some members in relation to the level of abatements being made by SLAB to accounts.

SLAB took the view that changes to the legal aid spend is not a sign of inadequate funding:

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

(Scottish Legal Aid Board)

SLAB also outlines that the number of firms and solicitors registered to provide legal assistance has increased over the last six years.

SUMMARY OF RESPONSES - THE SPECIFIC PROPOSALS

The discussion paper makes some specific suggestions designed to stimulate discussion on how to improve the legal assistance system.

The specific proposals are:

- * A single system (certificate) for criminal legal assistance and a single system for civil legal assistance
- * A block fee for police station advice work
- * Front-loading of fees to encourage early resolution of criminal cases
- * A new summary criminal legal aid system
- * A solemn criminal legal aid building-block system
- * A new system for criminal appeals
- * Financial eligibility in civil legal assistance could be reduced, and the subject matter of dispute exception removed
- * Areas currently within the scope of civil legal assistance could be reviewed
- * Alternative sources of advice should be developed and expanded
- * There should be promotion of alternative funding options and Government loans for legal services
- * Introducing means testing for Adults with Incapacity applications where there is a financial element

A SINGLE SYSTEM (CERTIFICATE)

The discussion paper suggested a single system for criminal legal assistance and a single system for civil legal assistance (rather than ABWOR, A&A and legal aid).

The proposal for a single certificate in respect of criminal and civil legal assistance has been met with broad support. Respondents highlighted that such an approach would assist with the administration of legal assistance.

“We agree wholeheartedly that.... a single system of criminal legal assistance would improve the system and presumably reduce administrative work within the Scottish Legal Aid Board.”

(Glasgow Bar Association)

“SHLS agrees in principle that a single continuing grant of Legal Aid would reduce the administrative burden”

(Shelter Scotland)

“One certificate with a set of clearly defined blocks would seem the best way forward”

(Simon Brown, Legal Aid Solicitor and Dean of Kilmarnock Faculty)

There are some reservations as to how this might work in practice:

“We can certainly see the sense of having a single grant of legal aid if it were to be operated in such a way as to streamline the administration involved. However, the concern would be that the legal aid board may seek to operate such a system in the exact opposite way. For example, they may ask for additional information at every stage of the process and effectively dictate how a solicitor deals with a file by suspending or threatening to suspend legal aid on a regular basis unless matters are dealt with in the way they dictate. There would also be a concern that a single grant of Legal Aid may take time to be approved whereas in many cases it is important that legal aid is approved immediately, as is the case with advice and assistance.”

(Airdrie Faculty)

Also, some responses doubted that there would be any practical benefit to the suggestion, and that having an early advice stage such as A&A is actually sensible:

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

(The SOLD Network)

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

(The Scottish Association of Law Centres)

A BLOCK FEE FOR PROVIDING POLICE STATION ADVICE

The discussion paper suggested the introduction of a block fee for police station advice work.

All of the responses that mention the issue of police station work state that funding arrangements should be reviewed and reformed.

“We agree that a block “callout” fee should apply to all attendances to advise a suspect at any point during the interview process, and a block fee for telephone advice, both without the need for financial verification or means test.”

(Edinburgh Bar Association)

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

(Glasgow Bar Association)

“A block fee for police station work should be introduced but the fee needs to be high enough to reflect the work carried out”

(LSS Criminal Practitioners’ Forum)

The GBA notes that the block fee would simplify the procedure but points out there can be large variances in the amount of time and effort involved. Similarly, the Society’s Criminal Practitioner’s Forum feels that a block fee for police station work should be introduced but that the fees need to be high enough to reflect the work being carried out. The forum emphasises that the Government should allocate additional funding for this work.

The EBA, GBA, Peter Lockhart and the SOLD Network believe that it is essential there should be no means testing or contributions applicable for this work. This is supported by members of the Society’s Equality and Diversity committee. The SOLD Network points out that such an approach would be consistent with other UK jurisdictions.

FRONT-LOADING OF CRIMINAL LEGAL ASSISTANCE FEES

The discussion paper suggested that fees could be front-loaded to encourage early resolution of criminal cases.

There is broad agreement amongst respondents that fees could be front-loaded to support early resolution.

“The current legal aid system is hindering the early resolution of cases and reform is required sooner rather than later.”

(Edinburgh Bar Association)

“We welcome the introduction of financial incentives for early guilty pleas in an attempt to increase the number of cases in which early resolution is achieved. We note that late guilty

pleas constitute almost a quarter of summary cases that reach trial stage. Being cited for and attending court in such cases results in unnecessary and avoidable stress and inconvenience for victims and witnesses. In addition to the emotional impact, many suffer financial and practical consequences, such as reduced or lost income.”

(Victim Support Scotland)

“The Faculty does not consider that it would be consistent with the interest of justice for legal aid to be used to create perverse incentives as regards pleas or settlement, but equally recognises it would be consistent with the interests of justice for the legal aid system to support the front-loading of work on a case, which may, in turn, promote early settlement”

(The Faculty of Advocates)

“Retaining the parity between payments for an early plea and a plea of not guilty and increasing the fees for S.76 and early pleas in solemn cases should ensure 'churn' is avoided.”

(Simon Brown, Legal Aid Solicitor and Dean of Kilmarnock Faculty)

Although there is much support for early resolution, there are some reservations on how this is achieved:

“I believe strongly in early resolution. However, so much depends on the Crown and their ability to disclose and engage with the defence. To my mind this is the greatest barrier to early resolution, that problem has become more acute, as cut backs have affected the COPFS. However, there are certain cases which simply cannot be resolved and will require to proceed to Trial. It would perhaps be unfortunate if the solicitor has taken steps to achieve early resolution, without success and then be penalised at a later date.”

(Peter Lockhart, Legal Aid Solicitor)

“The suggestion that the current system provides an incentive for not guilty pleas is followed by the proposal to front load the fee structure – which is in effect an incentive to plead guilty, by the same logic. I can see why the Government should be attracted by this, but why should lawyers seek such an outcome?”

(Liam Ewing, Solicitor Advocate)

“The blocks would have to be attractive enough to justify moving away from the present system.”

(LSS Criminal Practitioners' Forum)

The Criminal Practitioners' Forum points out that blocks for perusing documents and consultations would have to be paid to the solicitor in addition to core blocks (such as post-conviction blocks) and not subsumed.

SUMMARY CRIMINAL LEGAL AID - BUILDING BLOCK SYSTEM

The discussion paper suggested a new summary criminal legal aid system (with a "single-point" eligibility test, harmonised fees for guilty and not-guilty pleas and a building block structure).

Of those that mentioned the proposal, the suggestion of introducing a new summary block system was broadly endorsed.

BUILDING BLOCK STRUCTURE

"We agree that one grant of criminal legal assistance in summary cases would be appropriate and that a block fee would continue to be appropriate as long as there is an opportunity to apply for exceptional status in any case. A block fee for pleas of guilty and not guilty with an additional suitable payment for the conducting of any length of trial diet is required."

(Glasgow Bar Association)

The GBA believes that the distinction between cases in which the evidence takes less than 30 minutes requires to be removed, given existing work-load. The GBA also believes that the grant should remain in place until the conclusion of the case and afterwards if there are any further proceedings.

There is broad support for parity in payments for guilty and not guilty pleas.

"SINGLE-POINT" FINANCIAL VERIFICATION TEST

"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)

The suggestion of a "single-point" financial verification test is also supported by solicitor respondents.

However, the Edinburgh Bar Association response goes further, proposing that there should be automatic legal aid for all summary work in the Sheriff Court.

"We agree with the proposal for simplification of the system by virtue of a single certificate type. We also agree that the block fee should be the same whether a guilty or not guilty plea

is tendered. However, we would go further and suggest that legal assistance be automatic in ALL Sheriff court summary prosecutions.”

(Edinburgh Bar Association)

And

“The criticism we have of the discussion papers proposal that a financial eligibility test remain in summary criminal cases is that determination of the initial application can drag on for months under the current arrangements and we see no reason to believe that this would in any way improve.”

(Edinburgh Bar Association)

SOLEMN CRIMINAL LEGAL AID - BUILDING BLOCK SYSTEM TO ENCOURAGE EARLY RESOLUTION

The discussion paper suggested a solemn criminal legal aid building-block system (with enhanced S.76 plea fees and early settlement block fees)

The Crown Office and Procurator Fiscal Service discusses section 76 hearings.

“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)

Simon Brown, Dean of Kilmarnock Faculty, supports an enhanced fee for S.76 hearings and outlines that early pleas in solemn cases would reduce 'churn'.

“increasing the fees for S.76 and early pleas in solemn cases should ensure 'churn' is avoided.”

(Simon Brown, Legal Aid Solicitor and Dean of Kilmarnock Faculty)

Liam Robertson, Solicitor Advocate, agrees with addressing early resolution and that a section 76 plea would be beneficial to all.

The EBA endorses the proposals for the solemn block fee structure as set out in the discussion paper.

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

(Edinburgh Bar Association)

The GBA agrees with the suggestion of additional block fees for early resolution:

“additional fees for early resolution are essential to ensure that there is no conflict between the accused's interests and that of his/her representative.”

(Glasgow Bar Association)

However, the GBA also states:

“we disagree that these should be reducing on a sliding scale as the majority of continuations are at the request of the Crown or as a result of their actings or failures to act.”

(Glasgow Bar Association)

Marcus Brown, Defence Precognition Officer raises concerns that the solemn proposals would affect defence precognition work.

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

(Marcus Brown, Defence Precognition Officer)

He also suggests that any new fees should be:

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

(Marcus Brown, Defence Precognition Officer)

SLAB states that the Law Society has been inconsistent on its position in relation to S.76 hearing fees.

“LSS have now suggested a block fee system in solemn criminal cases. Proposals formulated in 2006 to introduce a fully blocked system of feeing in solemn criminal legal assistance were rejected by the profession. These proposals included a section 76 block fee for early settlement which is now called for.”

(Scottish Legal Aid Board)

NEW SYSTEM OF CRIMINAL LEGAL AID PROVISION CRIMINAL APPEALS

The discussion paper suggested a new system for criminal appeals.

The GBA supports the discussion paper suggestion on appeals, and the EBA favours a system which is close to existing arrangements:

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

(Edinburgh Bar Association)

FINANCIAL ELIGIBILITY IN CIVIL LEGAL ASSISTANCE

The discussion paper suggested that financial eligibility in civil legal assistance could be reduced

THRESHOLDS

The responses received have been fairly evenly split on the issue of reducing the net income threshold to qualify on financial grounds for civil legal assistance, though slightly more are against the proposal than are for it.

Those in favour state that the high limit encourages those who could reasonably pay privately to seek legal aid, and that contribution levels mean that, in practice, legal aid acts as a loan for those in the upper limits. They note that the impact on access to justice would be low and that savings would be made by lowering the eligibility threshold to some degree.

It is also noted that there are issues with having different eligibility thresholds for advice and assistance and legal aid:

“confusion...can arise when trying to advise a client that whilst they are not eligible for advice and assistance, they would be eligible for full civil legal aid. In many cases, that is simply inviting them to litigate!”

(Amanda Wilson, Legal Aid Solicitor)

Those against lowering the threshold note that this would likely impact most severely on particular groups, and would be contrary to the principle of universality and a demand led system, and would increase the number of unrepresented litigants. In addition, they note that this would not generate significant savings as a result of the application of contributions and clawback.

“Successive Governments in Scotland have supported this principle. Until now no one has sought to challenge it. In our view the representative body of Scottish solicitors should be doing what it can to maintain this principle, instead of pioneering ways to exclude sections of the public from the justice system.”

(The Scottish Association of Law Centres)

SUBJECT MATTER OF DISPUTE

Two responses specifically addressed the issue of removing subject matter of dispute. Both were not in favour of including it in the financial assessment stage as this would limit access, raising equality issues, and could result in someone being assessed as ineligible for legal assistance at the start of a case, but in the end be held to be not entitled to the property in dispute, which would have brought them under the threshold had it been disregarded at the start.

SCOPE OF CIVIL LEGAL ASSISTANCE

The discussion paper suggested that the areas currently within the scope of civil legal assistance could be reviewed so that expenditure could be targeted on areas that need it most

GENERAL

A very significant number of responses addressed the issue of whether areas should be removed from the scope of civil legal assistance.

The majority opinion was that scope should not be reduced.

Main themes in support of retaining scope included protection of vulnerable groups, and compliance with human rights standards. The proposal was seen as damaging access to justice, creating obstacles to advice and support to those who were most in need, and being contrary to the fundamental aims of the legal aid system. In addition, there were concerns that such a step would lead to greater compromises to the system in the future:

“No proposal should be made to limit scope in civil matters, as the experience from England and Wales indicates this will impact on various groups disproportionality and with real consequence, with the possibility that once removed something would never be able to go back in.”

(LSS Equality and Diversity Committee)

“the proposals made to cut legal aid from the areas identified in the discussion paper enters into dangerous territory by opening up discussions as to whole areas of law to be excluded from legal aid. Once the areas in question have been removed, who is to say the next step would not be to remove contact actions or other types of proceedings from the scope of legal aid?”

(Airdrie Faculty)

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

(Paul Brown, Legal Services Agency)

“This would mean that more people would be evicted, more claimants at Employment Tribunals would be unrepresented, fewer people could pursue personal injury claims, and in general the proportion of the population being able to access justice would be substantially reduced... This failure is exacerbated by the proposal that the availability of Civil Legal Aid and Civil Advice and Assistance should be reduced for large numbers of the population and for substantial categories of work. No consideration is given to the effects this will have on the members of the public affected. The proposals for Civil Legal Aid are ill-considered and arbitrary, and there is not even an attempt at justification.”

(The Scottish Association of Law Centres)

“the proposition made by the Law Society to omit certain areas from the scope of civil legal aid risks putting our most vulnerable in jeopardy with no realistic prospect of improving our current system of legal aid for either lawyers or the public...if the Scottish Government were to adopt this proposal thousands of people would be excluded from the protection of their rights.”

(The Scottish Council of Voluntary Organisations)

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

(SLAB)

It was also suggested that it was inappropriate for the Society to be:

“encouraging the diversion of business from their members to other service providers.”

(Glasgow Bar Association).

However, there were a number of responses that were supportive of the proposal to consider reducing the scope of civil legal assistance. These focussed on the need to prioritise funding and direct individuals to specialist advice:

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

(Shona Brown, Legal Aid Solicitor and Dean of Kilmarnock Faculty)

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

(The SOLD Network)

In some instances, this support was qualified, for example by the need to ensure availability of advice through an effective exceptional case system to allow legal aid where it would not otherwise be available, or on the introduction of some of the other proposals:

“The suggestions made appear to me to form a "package" and I think they would require to be implemented as a package. For example, removing the above categories of case from Legal Assistance, without creating a ‘Legal Assistance Loan Scheme’ would potentially be disastrous.”

(Stuart Hunter, Legal Aid Solicitor)

SPECIFIC AREAS

Some comments were made on the specific areas suggested in the paper for removal from scope. General comments were made that there did not appear to be adequate reasoning behind which areas were selected.

FINANCIAL ONLY DIVORCE

In relation to financial divorce there was one specific comment in favour of removing this from scope. In addition, there was a suggestion (in the context of supporting the general proposal of reducing scope) that

“If financial provision in family matters is to remain within the Legal Assistance Scheme, there needs to be a provision that enables Solicitors to charge their client's fees at private client paying rates (rather than Legal Aid rates) where a recovery is made.”

(Stuart Hunter, Legal Aid Solicitor)

In opposition, there was comment that even after a recovery is made in financial only cases, a client may not be able to make payment, for example if the recovery is in the form of a pension. In addition, the need to fund outlays in advance of any award was raised as an issue, as well as the link between legal aid and court fee exemptions, and that it is not an area where alternative sources of advice are available. It was also noted that these can be very complex cases, and that if there is a recovery, there is little cost to the legal aid fund.

PERSONAL INJURY

Regarding personal injury cases, it was stated that

“it is entirely inappropriate for legal aid to be removed from the scope of legal to force people to enter into speculative fee agreements... It is only appropriate in cases where the person pursuing the claim is in a financial position to be able to meet their own legal costs. To remove such actions from the scope of legal aid forces the poorest in our society to give up a portion of their damages. Those damages are agreed at a level to compensate the individual and if they have limited financial means then they will be reliant upon their full award of damages being received.”

(Airdrie Faculty)

Personal injury cases were seen to be often complex, both in terms of the issues and procedure, and it was noted that removal from scope would not generate significant savings.

The Association of Personal Injury Lawyers commented that:

“It is well known that civil legal aid for personal injury work is more or less self-financing, with an 85 per cent recovery rate from successful cases where judicial expenses have been recovered. In this 85 per cent of cases, no claim is made by the pursuer on the legal aid fund, as the defender pays the costs, and the providers of medical treatment can recoup their costs, too. Not only is legal aid in personal injury claims excellent value for money for the public, it is doubtful if its exclusion will lead to much in the way of savings” and that application rates are actually decreasing. They also noted that advice and assistance is frequently relied upon for preliminary investigations which would not be affordable to many who currently rely on legal aid, and are unlikely to be accepted by solicitors on a speculative basis. Overall, APIL states that “In personal injury claims, legal aid ensures a level playing field between the pursuer – who will most likely be a one-time user of the system – and the well-resourced defender insurance company. There must be equality of arms between the parties to ensure a fair hearing, and those who cannot afford to fund a legal representative themselves should not be disadvantaged.”

(Association of Personal Injury Lawyers)

HOUSING

Responses against removing housing from scope noted the considerable legal issues to be managed and the fact that this area affects the most vulnerable in society. Shelter Scotland also noted that if housing is removed from scope:

“there is likely to be a net loss to the overall public purse. Any savings seen in not providing Legal Aid to this area would likely be outweighed by the costs of increased homelessness, and medical services following on the negative impact of lack of or poor housing on individuals.”

(Shelter Scotland)

Shelter also noted the important protection of modification of expenses to nil in many legal aid cases. Shelter set out the following criteria that it would require in order to support any proposal to remove housing from the scope of civil legal assistance:

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

In contrast, at the discussion event on 3 December, it was stated that private solicitors cannot do housing law anymore because of the legal aid system – it cannot be done at a loss. As a result, this work goes to law centres that do it very well. It is not funded in a way that allows private solicitors to do it.

DEBT

Debt cases were highlighted as an area affecting vulnerable and low income individuals, who would be unlikely to be able to afford alternative funding options.

BREACH OF CONTRACT

One response noted that this is a very broad category that may impact considerably on vulnerable and low income groups, and that:

“Some elements of breach of contract include very complex areas of law and should not be dealt with by alternative service providers or necessarily on a private paying basis.”

(Glasgow Bar Association).

DISABILITY

Particular concern was raised about the potential for removing the suggested areas from scope to impact on people with disabilities. It was suggested that:

“there may be an impact disabled people due to both areas of law which could be affected by a change to scope (employment, housing, debt) and the link to low incomes. There is a particular link between mental health and the need for debt advice which should be considered.”

(LSS Equality & Diversity Committee)

EMPLOYMENT LAW

The greatest number of comments on a specific area of scope related to employment law.

Serious concerns were raised by practitioners as well as individuals and organisations with expertise in the area of employment law. This was seen as a proposal with particular potential to breach human rights standards, impact on those least able to afford private client alternatives, and severely restrict access to justice in an area which has already been negatively affected by recent reforms and where existing alternative sources of advice are inadequate. The Employment Lawyers Association stated that:

“It is felt that the removal of legal aid will be the final straw so that only those who can pay can assert their rights.”

(Employment Lawyers Association)

Many of these concerns are reflected in the response from Professor Nicole Busby, University of Strathclyde, who stated that:

“Given the overwhelming evidence that claimants to the ET experience particular barriers to justice, it is of crucial importance that any means of financial support currently available which is capable of alleviating the difficulties experienced by such individuals is retained. Such support should include the provision of independent legal advice and support up to and including representation at Tribunal... Whilst I welcome the Society’s ‘key proposal for civil legal assistance’ (LAS, at p.5) which would see the streamlining of such assistance with the current complex system replaced by a simpler process targeted at those most in need, I cannot reconcile the achievement of this goal with the proposals for amending its scope so as to remove employment law. This proposal seems totally at odds with the current views of those working in the field be it as legal practitioners, advice agency advisors and researchers who, according to the findings reported above, appear to be advocating for more financial assistance to be made available to individuals with employment disputes as a means of enabling them to access legal services”

(Professor Nicole Busby, University of Strathclyde)

Equality concerns were raised again in this area, given that many instances of discrimination and harassment are experienced in the workplace.

ALTERNATIVE SOURCES OF ADVICE

The discussion paper suggested that alternative sources of advice should be developed and expanded

Most responses addressing the issue of alternative sources of advice expressed strong concern over the proposal that advice agencies and law centres could be more widely used in place of a *judicare* model of legal aid solicitors.

There was significant doubt over the ability of these types of agency to cope with an increased amount of demand, and to provide the level of advice and representation that can be offered by a solicitor in private practice. In addition, accessibility issues (physical, geographic, and other) were raised as matters of concern as well as the potential lack of specialist advice and overdependence on lay representatives. In addition, the inability and/or unwillingness of the advice sector to undertake a representative role in court was also highlighted as a major concern:

“Advice services cannot, under the present law, conduct litigation on behalf of individuals...This is the real flaw in the Law Society’s proposal. In court proceedings, individuals require to be effectively represented and, in that context, advice services, however effective, cannot substitute for legal representation.”

(Faculty of Advocates)

The lack of secure funding and capacity was seen to be a significant obstacle, and there was not seen to be sufficient clarity as to how this would be addressed. In relation to the funding of law centres, independence was specifically raised as an issue with any move to a grant based approach:

“Many Law Centres depend on Legal Aid to survive, and so their core service would be jeopardised in key areas by these changes. Grant or block funding to advice centres/Law Centres from Government may impact on their independence (through conditions attached, retendering, etc) in a way that legal aid funding does not.”

(LSS Equality & Diversity Committee)

Although some acknowledged that the proposal might be a theoretically possible model, it was felt that practical issues meant that, in reality, it would not work and would severely damage access to justice:

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

(Scottish Association of Law Centres)

Again, many responses dealt specifically with the issue of employment law. It was felt that there is a particular lack of expertise and capacity to allow such a change to be made, and that the increasingly legalistic nature of the employment tribunal process meant that it was unrealistic to expect individuals to represent themselves. And, in relation to personal injury actions, it was said that

“The vague assurance within the consultation document that the advice network could accommodate these cases betrays a level of ignorance about the realities of this kind of

work. There is neither the appetite nor the expertise within the advice sector to deal with these cases. Without the advice and assistance framework in place, those who require legal aid will likely be denied access to justice.”

(APIL)

Finally, there were comments on the fact that the nature of the proposal would simply mean shifting public funds (or the issues around a lack of public funds) to a different sector, and that this would neither generate savings nor benefit the public or solicitor profession. There were calls for the advice sector and legal profession to work together to address the need for advice and representation, but it was generally not felt to be appropriate to shift the responsibility for areas of work away from private solicitors and towards the advice sector.

SLAB noted in particular that:

“Legal aid has developed from a system which funds casework undertaken by solicitors and advocates operating in traditional business models to the current position which supports targeted grant funded assistance, direct services provided by SLAB alongside the traditional solicitor model of case by case legal assistance in private businesses and law centres.

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

(SLAB)

ALTERNATIVE FUNDING OPTIONS AND GOVERNMENT LOANS

The discussion paper suggested that there should be promotion of alternative funding options and Government loans for legal services

PRIVATE CLIENT OPTIONS

In relation to alternative funding options, there was considerable doubt over the ability of all those currently eligible for legal aid to be able to afford private rates for legal advice. There was also concern in relation to the suitability of different funding options for certain types of case. For example, it was stated that:

“the alternatives suggested are in fact less appropriate for cases brought in the Employment Tribunal than the ordinary courts, particularly in relation to speculative arrangements, given the generally low value of awards in employment cases and the operation of the rules on expenses”

(Faculty of Advocates Employment Law Group)

And that

“Solicitors cannot be expected to arrange speculative fee agreements in actions such as family actions which can take some years to conclude with numerous outlays being expended throughout the conduct of the case. Likewise, solicitors cannot be expected to defer payment of fees in similar cases.”

(Glasgow Bar Association)

LOANS

There was some support for the introduction of publicly provided affordable loans. The Faculty of Advocates Employment Law Group suggested this:

“could assist with the current crisis brought about by the introduction of fees in the tribunal system”

(Faculty of Advocates Employment Law Group)

Others suggested that this would be a necessary balance if eligibility were to be lowered, or scope reduced. However, support was often cautious, conditional on it not leading to increased debt for vulnerable individuals, and questioning the administrative arrangements that would be needed.

Others were not in favour, suggesting that the financial burden of a loan was not an appropriate substitute publicly funded legal assistance for vulnerable and low income individuals, or, particularly, for those seeking advice on debt issues.

MEANS TESTING FOR ADULTS WITH INCAPACITY

The discussion paper suggested introducing means testing for Adults with Incapacity applications where there is a financial element

The discussion paper mentions proposals to introduce means testing for adults with incapacity applications that include a financial element. This is not discussed in detail, as it is the subject of a separate proposal being developed by the Scottish Government at this point. However, the issue was picked up by a number of respondents.

Two cautioned against the proposal, suggesting that it would not generate savings and would require “significant justification”. On the other hand, Airdrie Faculty supported the proposal, saying

that “where the adult has significant assets from which to meet the costs of a guardianship application, there does not seem to be a clear rationale as to why that cost should be borne by the public purse” and that it would generate savings. The Glasgow Bar Association had “conflicting views” on the issue, noting that it would make sense to means test those with a financial element, but that there was the challenge of situations where “the applicant is not aware of or not able to access the adult’s resources until they are able to obtain an order from the court”.

ADDITIONAL SUGGESTIONS FOR CHANGES TO THE LEGAL AID SYSTEM

A number of responses included suggestions for additional or alternative changes to the legal aid system. These included:

- * Improve the merits test
- * Reduce or remove the peer review system
- * Remove assumption that solicitors will assist individuals with the non-legal elements of the application process
- * Ensure proper use and funding of defence forensic experts
- * Address continuing difficulties clients have with Form 2
- * Have the Crown pay the legal costs of accused persons who are acquitted
- * Have a set figure (around £500) for summary legal aid, and allow solicitors to charge privately for work above that level
- * Ensure Government pays for legal advice for accused in police custody
- * Transfer responsibility for financial eligibility assessment for police station advice to SLAB, as SLAB has first contact, and inform client that if not eligible, and refuses to pay, they decline their right to legal advice. If agree to pay privately, sign an irrevocable mandate, recovery of fee by SLAB who underwrites fees to the solicitor
- * Reinstate regulation 16(K) for employment tribunals
- * Increase the legal aid rate to reflect the work involved
- * Introduce awards of expenses to successful litigants in tribunals as general practice
- * Hold a vote of members (including PDSO) as to whether they should withdraw labour until an independent body is asked to set a reasonable level of remuneration
- * Look into the situation of whether, in a situation of contracting being introduced, contracted solicitors would be deemed to be employees

- * Instruct a study to produce statistical information on what fee level is required to have a sustainable practice.
- * Require SLAB to process all taxation results
- * Increase scope to include greater access for administrative justice issues
- * Address issues around financial eligibility and access to advice for children
- * Wind up the PDSO or ensure refers clients equally to firms
- * Consider differential PC rates for legal aid practitioners
- * Introduce staged block fee for perusals
- * Recommend increases across the unit and block fees for all categories of legal assistance
- * Create 'add on' fees for blocks to adequately remunerate more involved cases
- * Simplify online system, particularly for special urgency procedures
- * Introduce automatic legal aid for first appearances at CPOs and ICSOs/place of safety warrants, and bring children's ABWOR rates in line with full legal aid rates
- * Require the setting out of a valid defence/position in a defence statement as a condition of granting legal assistance where a not guilty plea is contemplated
- * Introduce clawback from proceeds of crime
- * Reform Employment Tribunals as a specialist Employment and Equality Court
- * Consider what changes to solicitor business structures and models would advance the needs of the public and create the conditions for modern public service delivery