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National Report from Scotland

The Scottish Legal Aid Board

www.slab.org.uk

The Current Landscape

1. The current political landscape in both Scotland and the wider United Kingdom has been dominated by a referendum and anticipation of elections. Scotland narrowly decided to stay part of the wider United Kingdom in a Scotland wide referendum in September 2014. Following this, Alex Salmond MSP, the First Minister of Scotland stood down and was succeeded by Nicola Sturgeon MSP, a former legal aid lawyer who has worked in a law centre.
2. In the resultant Ministerial reshuffle, both the Ministers responsible for justice issues have changed. The new Cabinet announced a new programme for Scottish Government at the end of November 2014 with a focus on three key themes: creating more, better paid jobs in a strong, sustainable economy; building a fairer Scotland and tackling inequality; passing power to people and communities. In terms of legal aid's contribution to this, Ministers are still considering their overall priorities and they will be using the coming months to reassess the legal aid landscape while seeking views from key stakeholders.
3. In the immediate term, Ministers have asked us to focus on some specific issues. The Scottish Government has previously considered the introduction of a contractual relationship with solicitors providing criminal legal assistance. Ministers have announced that, following receipt of our advice, that although they see benefits to contracting in the future they agree that further work with the legal profession is required to help them prepare for this significant change. Ministers have asked us to proceed with work that will lay sound foundations for contracting in the future, such as updating the Code of Practice for Criminal Legal Assistance and how best to manage our police and court duty schemes. In addition we will also work in collaboration with the legal profession and the Scottish Government to identify further opportunities to streamline, simplify and modernise the legal aid system. The aim is to make improvements in the shorter term and identify longer term ambitions and opportunities that may require primary legislative change.
4. On 7 May 2015, there were UK wide elections for the United Kingdom Parliament. A UK budget exercise will follow shortly afterwards which will include a new three year settlement of funds from 2016-17 for issues that are devolved to the Scottish Parliament (including justice and legal aid). The next Scottish wide elections for the Scottish Parliament will be held in May 2016.
5. In the absence of Scottish Government budgets post 2015-16, the future expenditure challenges facing legal aid are therefore unclear at this stage. It is, however, almost certain that there will be requirements for further savings and efficiencies. Expenditure on legal aid cases in Scotland continues to be uncapped. The current administration is committed to maintaining this principle and its deliberations about legal aid priorities will necessarily consider how sustainable levels of expenditure can be achieved within the context of the current economic climate.
6. The Law Society of Scotland (the professional body for solicitors) published a discussion paper at the end of 2014 in which it proposed a number of changes to the criminal and civil legal aid systems. Their main focus is on increasing investment in legal aid, which would then increase fees paid to solicitors. On criminal legal aid, the main thrust is around the simplification and harmonisation of feeing arrangements as well as revised arrangements for the supply of advice in police stations.
7. The paper also proposed reducing the scope of civil legal assistance. It suggested removing a significant number of categories of law e.g. debt and housing, from the scope of civil legal assistance. It suggested that the advice sector could deal with the demand in these areas. This was a controversial proposal which was subject to widespread criticism from the voluntary sector, solicitors and others including SLAB and has now been withdrawn.
8. Some of the changes proposed, particularly around simplification, had already been suggested by SLAB in previous years but rejected by the Law Society.
9. Although the paper agreed with SLAB's publicly expressed view that further simplification of the legal aid system would be beneficial to support access to justice and achieve value for money, we responded that the particular proposals have too narrow a focus, did not help access to justice and

did not recognise the current mixed model in Scotland which involved judicare, employed solicitors and the advice sector. You can read our response to the paper at:

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

10. The Law Society has now published the responses to its consultation and its final recommendations. <http://www.lawscot.org.uk/members/legal-aid-and-access-to-justice/>
11. Collaboration between government organisations in the justice sector continues to be prioritised in the delivery of justice system reforms. Delivery of the Scottish Government’s Justice Strategy¹ and oversight of the strategic direction of the justice system is overseen by a Justice Board on which is represented senior officials from the Scottish Government alongside the Chief Executives or equivalent of each of the main justice organisations i.e. legal aid, courts and tribunals, prosecution service, police and prisons. In addition, a Justice Leaders Network meets around four times a year, attended by senior officials from across the justice sector to discuss and share ideas around the development of the justice system.
12. This has led to a more sectoral approach to strategy which is now seen as a model of good practice across the wider public sector in Scotland. The Justice Strategy for Scotland was published in 2012 and this was followed in 2014 by a Digital Strategy for Justice², the first cross sector digital strategy of its kind in the Scottish public sector.
13. Joint working also exists at an operational level with a range of issues discussed and developed e.g. legislation and business trends through cross sector working groups or project boards.

Demand and Expenditure in 2014-15 (all figures are provisional)

	Expenditure	Applications
Total Legal Assistance	c.£138.7 million. This is nearly 8% less (£12million) than the previous year. This is largely attributable to a fall in demand and the speed by which criminal business has progressed to conclusion and the point where accounts can be lodged with us. We expect that expenditure will rise in following years. The timing of a significant amount of legal aid expenditure has therefore been delayed into 2015-16.	
Civil Legal Assistance	Net expenditure was c.£44 million, a fall of 8%. Gross expenditure on grant funded projects was c.£6.3 million which has increased significantly in recent years as a result of the Scottish Government and Money Advice Service providing extra funding for	The downward trend in demand for civil legal assistance has continued with applications for civil legal aid of 18,900 , a fall of 6.5%. Applications for guardianship and intervention in the case of adults with incapacity continue to rise, up 20% to 3,800 . Applications for advice and assistance were

¹ <http://www.gov.scot/Topics/Justice/justicestrategy>

² <http://www.gov.scot/Topics/Justice/policies/enhancing-efficiency/justice-digital-strategy>

	an extended programme to deliver a range of direct help on arrange of issues, predominantly aimed at tackling debt and the impact of welfare benefit cuts introduced by the UK Government.	63,400 , a fall of 13%.
Criminal Legal Assistance	c.£85.4 million , a fall of around 9%.	Applications for summary criminal legal aid were 57,800 , a slight fall of 1.5%. Applications for criminal ABWOR were 30,200 , a fall of 10%. Applications for criminal advice and assistance were 26,600 , a fall of 9%. Applications for solemn criminal legal aid were 13,300 , a rise of nearly 4%.
Children's Legal Assistance	c.£5.2 million , a rise of around 7%	Applications for children's legal aid were around 3,600 , a fall of around 10%. Applications for children's advice & assistance and ABWOR were 8,800 , a rise of around 33%. Due to changes introduced to legal assistance for children's hearings cases in June 2013, meaningful comparisons with previous years cannot yet be made.

Supply of Legal Aid

14. 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 2014 notwithstanding) the number of firms and solicitors has increased: from 575 firms and 1,368 solicitors registered to provide criminal legal assistance in 2009 to 556/1,359 firms/solicitors by close 2014/15. The reduction in firms can be explained by a number of mergers and the slight reduction in number of solicitors is related to some sole practitioners withdrawing from the market.
15. Civil business increased during the recession, with greatest growth in contact/residence disputes involving children and applications for orders to assist in financial management for, and care of adults with incapacity. The number of firms registered to provide civil legal assistance increased during the economic downturn, rising from 634 firms in 2009 to 679 firms in 2014.
16. Neither of these trends suggests that firms are unwilling or unable to provide services at legal aid rates.

The Courts Reform (Scotland) Act 2014

17. The Bill was passed by the Scottish Parliament in October 2014.
18. The policy underpinning the Act, which is mainly but not exclusively concerned with the civil court system, is that the right cases should be heard in the appropriate court, that unnecessary delays and inconsistent costs to users should be minimised, and that the efficiency of the courts should be increased. This policy was developed as part of Lord Gill's review of the civil courts and the Act is implementing many of the recommendations of that review.
19. The Act will have a significant impact on legal aid in terms of procedure and feeing arrangements and we are currently working with the Scottish Government on regulations to support the Act, some of which will come into force from September 2015. The Act should also enable savings to be made on legal aid, for example, through reducing the number of cases which must be pursued in the most expensive procedure.
20. The most significant change for legal aid is an increase in the lower limit for civil cases at first instance in the Court of Session from £5,000 to £100,000. This is designed to reduce the number of low value cases going to the Court of Session and to concentrate the resources of the Court on high value and complex cases. There will be a resultant saving in legal aid expenditure (as we expect to pay less for cases in the Sheriff Court). Alongside this will be the creation of a new specialist Personal Injury Court sitting in Edinburgh.
21. Other changes of note made by the Act are:
 - a. Creation of a new specialist 'Summary Sheriff' dealing with family and some other cases such as eviction cases and summary crime. This will facilitate greater flexibility in the management of court business given the introduction of a wider range of members of the judiciary.
 - b. Creation of a new Sheriff Appeal Court which will mean that some criminal appeals from the Sheriff Court will no longer be dealt with by the High Court (the highest criminal court) but can be dealt with by Sheriffs in the new Appeal Court.
 - c. Introduction of a three month time limit for when actions for judicial review should be brought.

The Criminal Justice (Scotland) Bill

22. This Bill implements many of the recommendations of a judge, Lord Carloway, made in 2011 on practice and procedure in the Scottish criminal courts. A number of the Bill's proposals will have a significant impact on the system of criminal legal assistance. In particular, publicly funded legal advice will now be available at the point of police custody, not just at a police interview. In addition, new court procedures will give the opportunity to challenge special bail conditions and the resumption of questioning at a later date. The new measures will result in significant changes to SLAB's Solicitor Contact Line service, the police station duty plans, and also bring the need for new legal aid arrangements for the new court proceedings. The government's timetable for completing the legislative process has not yet been announced.

Most of the publicity and public debate around this Bill has been in connection with the proposal to remove the need for corroboration (two separate pieces of evidence) in Scottish criminal cases. The change was proposed by the previous Cabinet Secretary for Justice based on a recommendation by Lord Carloway. The proposed shift in evidential rules policy was particularly linked with a policy to increase the conviction rate in cases involving sexual offences. Due to some public and legal opposition, a judge, Lord Bonomy was asked to look into the possible safeguards that would be required should corroboration be removed. Lord Bonomy published his report in April 2015. The new Cabinet Secretary for Justice has announced that the proposal is to be dropped from the Criminal

Justice Bill to give the Scottish Government more time to consider the implications of the report and the range of safeguards considered. The removal of corroboration may go ahead at a later date, but the Government did not want to delay the implementation of the rest of the Bill whilst considering the range of safeguards suggested by Lord Bonomy.

23. The Bill will, if implemented as intended, have an impact on the demands on police station advice, and how we deliver and fund our obligation to make solicitors available to a greater number of persons in the police station.

Grant Funding

24. The Scottish Government has extended our grant funding programmes (see explanation later). These programmes are funded by Scottish Government and the Money Advice Service. Gross expenditure increased in 2014-15 to £6.3 million. Expenditure was £2.2 million in 2012-13.
25. Two grant funding programmes have a total of 92 grant funded projects across Scotland. A third programme launched an additional 16 projects in October 2014 which target advice at low income families with children who face a change in their circumstances which places them at higher risk of debt and money problems.
26. Separate to these three programmes, a *Scottish Women's Rights Centre* was launched in April 2015 to ensure that women in Scotland experiencing gender based violence are able to access timely and appropriate legal advice and information. Grant funding from SLAB will cover the costs of a full time solicitor for the Centre.
27. Since we started grant funding, we have committed £15 million to advice projects.

Justice Digital Strategy

28. The concept of using digital services to change the way in which public services are delivered in Scotland has been growing in importance in the last couple of years. As part of this, Scotland's *Justice Digital Strategy* was launched on 20 August 2014³. It covers the full extent of the administrative, civil and criminal justice systems.
29. The strategy promotes a "digital first" approach to policy development across the justice system. It identifies three objectives (access to the right information at the right time; fully digitised justice systems and making data work for us). Key deliverables include:
- a. A Justice Portal which will provide citizens, users of our justice systems and businesses access to a range of information, advice and interactive help
 - b. A secure digital platform which will allow justice organisations, other public services, third sector and private sector the ability to share information securely;
 - c. Further use of live video conferencing TV links and development of online mediation and arbitration systems;
 - d. Digital recording of evidence, reports, decisions and judgements (including submission of pleadings and the use of digital warrants);
 - e. Digital courts; and
 - f. Digital legal aid applications. We have had an entirely online application process since 2011 and we are preparing the final move to a wholly digital account lodging process. We are also leading on the development of a cross justice portal and one of the first products will be an online financial eligibility form for applicants to complete and submit online.

³ <http://www.gov.scot/Topics/Justice/policies/enhancing-efficiency/justice-digital-strategy>

30. SLAB administers the legal aid system which enables people to gain access to justice and in a way which delivers value for money. Our main functions include:
- a. **Assessing applications** and deciding whether to grant legal aid or authorise expenditure. Including applications for advice and assistance, full legal aid, sanction requests and applications to review our decision to grant. We apply the statutory tests to each application for legal aid to ensure that legal aid is only granted in line with legal aid legislation.
 - b. **Assessing and paying for the case work done by solicitors and advocates.** We assess a large volume of accounts and in doing so must be satisfied that the work has been invoiced in the correct way.
 - c. **Tackling fraud and abuse** of legal aid by carrying out audits and investigations of legal aid providers and investigate the information provided by applicants for legal aid.
 - d. **Advising Ministers** on the operation of legal aid in Scotland. We do this by observing the way that the justice system and legal aid operates and analysis of trends and supply patterns in legal aid.
31. Legal aid in Scotland funds a mixed model of help. The vast majority of legal aid is delivered through solicitors in the private sector on a case by case, on demand basis. SLAB also registers solicitors and firms to carry out legal assistance. It is primarily a system which focuses on enabling broad access to assistance from solicitors in private practice or law centres without there being a cost limit. This means that legislation requires the Scottish Government to provide the funding for all legal aid applications that meet the statutory tests. People seeking legal aid will not have their applications refused because funding is unavailable.
32. There is also a grant funding programme which funds direct delivery projects involving a range of different organisations working in partnership, that deliver targeted help to people on a range of Scottish Government priorities. For example one of our current funding streams complements the Scottish Government Child Poverty Strategy which focuses on early intervention/prevention, building on the assets of individuals and communities, and ensuring that children's and families' needs and abilities are at the centre of service design and delivery. In this programme we fund non-traditional routes to advice (such as mid-wives), to link families to money advice. Unlike legal aid expenditure, this programme has fixed expenditure limits.
33. Help is also provided through SLAB employed solicitors. We have a small network of four Civil Legal Assistance Offices that deliver targeted civil legal assistance in areas where there is unmet need. On criminal legal assistance the Public Defence Solicitor's Office operates a network of seven offices across Scotland where SLAB employed public defenders provide help with criminal matters.
34. A Solicitor Contact Line operated by SLAB employed solicitors was set up from July 2011 to provide 24/7 cover and is the initial contact point for the police after a suspect has indicated that he wishes legal advice. If the suspect has their own solicitor, the contact line solicitor contacts that named solicitor or firm so that they can provide telephone advice or, attend in person, where this is needed. Where there is no named solicitor or firm or the named solicitor is unable to provide advice, the contact line solicitors will provide telephone advice and, where a personal attendance is required, arrange for a local duty solicitor to attend with the suspect.
35. An explanation of some of the terms you may hear in relation to legal aid in Scotland:
- Legal assistance:** comprises all payments made from the Legal Aid Fund to provide assistance. It includes case by case payments to solicitors and advocates, expenditure associated with the operation of our direct services (PDSO, CLAO and SCL) and grant funding.

Legal aid: pays for solicitors and advocates to represent people in court. It is subject to means and merits testing.

Advice and assistance: is granted by a solicitor. Advice and assistance helps to pay for a solicitor to give advice on any matter of Scots law, but does not normally cover representation in court. There is no merits testing in the grant of A&A.

ABWOR: a form of advice and assistance under which in certain circumstances, normally in criminal cases, a solicitor can appear in court on behalf of his client: it is also used for representation at tribunals and children's hearings. Some ABWOR is merits tested.

Legal Aid Fund: All payments for legal assistance are made from the Fund. The administration of legal aid is not paid from the Fund.

Clawback: SLAB may claim back the cost of fees and outlays from an assisted person if they recover or preserve property as a result of their legal assistance.

Special Urgency: From time to time work has to be undertaken by a solicitor to protect their client's position before an application for civil legal aid can be finally determined. Specific legislation allows a solicitor to do certain work as a matter of special urgency and inform SLAB afterwards.

Advocate/Counsel: Lawyers who are members of the Faculty of Advocates and have rights of audience in the highest courts in Scotland.

Duty solicitor: The duty scheme is a roster of solicitors, administered by SLAB, that can be called upon to give advice to people in police stations or appearing in court from police custody who do not have a named solicitor.

Reasonable test in civil legal aid: SLAB's governing legislation requires us to be satisfied that it is reasonable in the particular circumstances of the case that civil legal aid is granted.