

DISCUSSION PAPER

**Protecting Scotland's
vulnerable and low income
citizens:**

**future regulatory reform of
legal aid**

**access to justice committee
law society of scotland**



THE LAW SOCIETY
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INTRODUCTION

Last September, the Law Society of Scotland's Access to Justice Committee (AJC) raised concern over the impact of the Coalition Government's plan to cut welfare benefit spending by £15bn over the next four years.[1] In our view, such unprecedented welfare cuts in Scotland would cause serious hardship, resulting in an increase in mortgage repossessions, evictions, household poverty, and consequent Scottish job losses of up to 25,000, with over £1bn removed from the local Scottish economy over the next four years.

We recognised that the hardest hit area in Scotland would be Glasgow, followed by North Lanarkshire, South Lanarkshire, Fife and Ayrshire; but all Scottish local authority areas would be significantly affected.

We said: *"The consequence of the unprecedented cuts to welfare benefits in Scotland is that Scots will need greater access to legal advice and assistance, and representation, whether to prevent mortgage repossession, eviction, or to appeal the removal of breadline benefits"*.

The AJC believed that: *"There has never been a more important time to maintain the level of public funding in Scotland for front line legal, welfare rights, and money advice services in Scotland"*. [2]

Since then, the Scottish Government announced its budget in November, with cuts to Scottish legal aid in the order of 8.2%. In anticipating the reduction in funding available, the AJC suggested in October last year that it may be possible to make significant expenditure savings by reorganising the way we administered legal aid.[3]

The Scottish Legal Aid Board and all previous governments have stated repeatedly that there was no fixed budget for legal aid provision in Scotland. Because legal aid in Scotland is 'demand-led' and not 'budget-led' the ability to impose cuts is severely limited, essentially to administrative cuts or a reduction in the level of fees paid to solicitors and advocates, or the level of outlays paid to expert witnesses.

This **Discussion Paper**, builds and expands upon our initial thinking, identifying tried and tested tax efficiency initiatives and structural reforms which could secure budgetary savings without the need to reduce frontline services for vulnerable Scots.

Our approach would enable existing Scottish Legal Aid Board resources such as the Civil Legal Assistance Offices (CLAO) to be taken into community ownership, and restructured **as local community law centres**, with the purpose of tackling the growing unmet legal need within local communities across Scotland.[4]

Furthermore, our approach would enable the £1.6m per annum (excluding final pension scheme costs) used to fund the largely ineffective, unnecessary and inefficient Public Defence Solicitors' Office (PDSO) to **secure budgetary savings, or be redeployed to fund victim support services, more welfare rights and independent money advice services, law centres, the advice sector, or civil legal aid services generally.**

We believe the priority must be to protect Scotland's vulnerable and low income citizens from the worst consequences of unprecedented welfare benefit and public funding cuts. This cannot be done in the current economic climate without innovative regulatory and structural reform of our existing legal aid system.

We would like to hear your views and ideas on the issues explored in this Discussion Paper.

You can e-mail comments to our Committee Secretary: Andrew Alexander, Secretary to the Law Society of Scotland's Access to Justice Committee at AndrewAlexander@lawscot.org.uk

SAVINGS FROM FUTURE REGULATORY REFORM

The Scottish Legal Aid Board (SLAB) is a Non-Departmental Public Body (NDPB) set up in 1987 under the Legal Aid (Scotland) Act 1986. It is accountable to the Scottish Ministers. A key objective for the Board is to operate within its administration budget and to manage the Legal Aid Fund. The principal activities of SLAB are:

- advising Scottish Ministers on how legal aid is working, and ways to develop it
- managing the Legal Aid Fund
- deciding whether to grant applications for legal aid
- deciding if people have to pay towards the cost of legal assistance, then

collecting these amounts

- assessing solicitors' and advocates' accounts for legal aid work, and paying them for the work they have done
- registering firms and solicitors who do legal assistance work and making sure these firms and solicitors maintain high standards, including funding civil quality assurance which is run by the Law Society of Scotland
- investigating and tackling fraud and abuse of legal aid
- developing a network of Public Defence Solicitors' Offices (PDSO) through Board employed solicitors who offer criminal legal advice and representation, and also, under Part V of our legislation, developing a network of Civil Legal Assistance Offices (CLAO) to offer advice services on civil matters using Board employed solicitors
- providing grant funding for legal advice and other services
- exploring new ways of delivering legal aid services.

As a NDPB, SLAB is not eligible to register for Value Added Tax (VAT) and therefore all of its payments and purchases are inclusive of VAT.[5]

During 2009/2010, VAT on the fees paid to solicitors, advocates, and solicitor-advocates represented £17m or 11.6% of total Scottish legal aid expenditure (excluding the Board's operational costs). The total paid will be higher when one includes VAT paid on other supplies. From January 2011 VAT rose from 17.5% to 20%, which would have represented £19.4m on the cost of legal services alone on current figures.

In Scotland, many public sector bodies have already taken advantage of restructuring some of their activities to benefit from charitable status and/or tax and other savings which would otherwise not be available given their legal structure and status. **There is no reason why SLAB could not do likewise to take advantage of tax savings.** At present SLAB's activities are undertaken within five departments: Audit and Compliance, Legal Services, Policy, Corporate Services and Accounts, and the Chief Executive's Office.

For the purposes of this Discussion Paper we propose reorganising SLAB into three separate legal entities[6]:

- **'Treasury Scotland LLP'** - a not-for-profit Limited Liability Partnership (LLP) trading arm, comprising of the existing Accounts, Audit and Compliance departments (representing just over £7m of the

Board's annual operational spend). This trading arm would undertake existing accountancy, audit and compliance functions through a service level agreement with SLAB, working with Judicare Scotland. It would also offer general accountancy and audit services as a trading activity within the public, private and third sectors, to offset its running costs.

- **'Judicare Scotland'** - a registered Scottish charity, comprising of the existing legal services and policy departments (representing just over £4m of the Board's annual operational spend). This charitable body would make grants of civil and criminal legal aid, hold funds to pay for such grants, and undertake strategic policy work, through a service level agreement with SLAB.
- **'Scottish Legal Aid Board'** - an NDPB, comprising of the existing Chief Executive's Office (representing just under £1m of the Board's annual operational spend).

The precise tax consequences of the proposed restructuring are difficult to quantify without a substantial amount of work. However, there would be a major improvement in the overall VAT recovery position. As noted, SLAB at present cannot register for VAT, however, Judicare Scotland would in principle be eligible to register for VAT as a Scottish charity, undertaking charitable trading activities. Charitable status would also entitle Judicare Scotland to mandatory rates relief, reducing its overheads in relation to leases and property.

The trading LLP, Treasury Scotland LLP, would make taxable supplies to Judicare Scotland and potentially third parties of trading services. The trading LLP would also incur input VAT relating to its administration costs. As the trading LLP it would be making taxable supplies, it would be able to recover the input VAT which it incurred on the goods and services which it purchased.

The AJC believe this proposal merits further consideration and investigation, particularly as the Scottish Government is looking to make savings in the order of £12m from the Scottish legal aid budget due to central government funding cuts. We understand it is possible to significantly improve the tax position of SLAB so as to lessen the impact of any budgetary cuts.

In relation to the PDSO and CLAO, SLAB advise that the respective costs of these projects are, respectively, £1.6m and £1.04m, however these figures do not include liabilities due under an unfunded final pension scheme. The salary cost for both the PDSO and CLAO represents £1.52m per annum, giving an estimated employer's cost of £203,546 per annum in employer contributions.

If the CLAO were restructured as independent, small, locally accountable charities - tackling unmet legal need in local communities - there would savings in terms of mandatory rates relief, further, they would be eligible to bid for additional voluntary sector and charitable funding.

TACKLING UNMET LEGAL NEED IN SCOTLAND'S COMMUNITIES

Scotland is going through a serious economic downturn; both UK and Scottish Governments are implementing unprecedented public sector cuts; and we are seeing a withdrawal of rights which will effect vulnerable people

Unemployment is high and growing, youth unemployment in particular is high. We are seeing an attack on welfare benefits in the region of £15bn when many more people will need to rely on them. Many of the low paid and most vulnerable will be hit hard. We are seeing an increase in repossessions and evictions, a reduction in household income for the disabled, sick and unemployed, and many of the extra public services that so many rely on in health and education will no longer be available. Further rights are being eroded too: the qualifying period for an employment tribunal is to be increased back to two years.

At a time when many Scots will require advice support and assistance to cope the legal aid budget in Scotland will be subject to an 8.2% cut. Furthermore Scotland's advice and information systems have grown organically. The past decade has seen a strategic overhaul of Scotland criminal justice system. It is now time to address access to Scotland's civil justice system.

Spending cuts and the economic squeeze increase the threat to jobs and homes and is putting pressure on families. Leaving the poorest, disadvantaged and most vulnerable to largely fend for themselves in legal

and quasi-legal matters in this climate is a recipe for unfair decision-making, people missing out on their entitlements, and increased social problems.

As the Scottish justice system is adversarial in nature it is important that both parties enjoy 'equality of arms'. We have a duty to provide adequate assistance to ensure everyone can protect their legal entitlements and ensure that they are being treated fairly.

Early access to good quality advice is good value for money. It diverts those whose cases are not strong from pursuing hopeless challenges, it also cuts the cost of court time and ensures, for example, that the poorest are decently housed, get their entitlements, are protected at work, and that children's interests are properly looked after. All of which reduce the cost of a myriad of social problems further down the line.

Cuts to local authority budgets in Scotland will put council welfare rights units and independent local advice agencies at risk. The Voluntary Advice Sector, including CABx, are already having to make cuts and face redundancies. Just at the time their clients need them the most.

Our Principles

It should be a basic principle that our justice system should be a public service for all. Our justice system should try to prevent; as well as mop up the consequences of poverty and inequality.

Everyone should have access to advice and information to cover the range of areas most important in their lives. If faced with a significant legal problem people should be able to get the appropriate level of legal advice, assistance and representation they need to deal with their problem.

Our justice system should:

- meet the needs of everyone, and be based upon legal need
- provide a comprehensive range of services to meet the needs of different populations
- works with others to provide a holistic service to people in need, and
- support and value those who work in the legal advice and information services.

These principles should be the responsibility of government and local control, not the market and government NDPBs. We accept that in present climate legal services cannot be universally free at the point of delivery, but no person should be denied the opportunity to access legal services because of a lack of resources.

This is a time to shift resources from other areas to protect those most in need. The following is a typical example of what is happening to vulnerable people up and down Scotland as a consequence of the Coalition Government welfare cuts:

Ms Reid suffers from arthritis, spondylitis and has a heart condition that can leave her breathless. She was in receipt of incapacity benefit (ICB), disability living allowance (DLA) and full housing benefit (HB). She resides in her housing association tenancy along with her two non-dependent daughters, both of whom work in low paid jobs.

As a result of the Coalition Government's welfare changes, Ms Reid has been taken off ICB and failed the new medical test for Employment Support Allowance. Her DLA has recently been reviewed and disallowed. As a result her income has dropped substantially, resulting in her being unable to meet her ongoing financial obligations.

Bank charges and unauthorised rate interest are now being applied to Ms Reid's personal current account, along with charges for bounced direct debits. A Consumer Credit Act default notice has been served for her failure to maintain a Hire Purchase Agreement.

Because she has lost her DLA non-dependent deductions have been applied to her HB, resulting in the accrual of rent arrears and the landlord has served a Notice of Proceedings for Recovery of Possession, threatening her eviction if she does not clear her arrears and meet her ongoing rent in full.

All of these problems are justiciable issues which can be challenged and resolved with good legal, welfare benefits, and independent money advice.

Policy

We need a new strategic body that prioritises access to justice and is tasked with ensuring we have a system of universal access of justice in Scotland; which tackles poverty and disadvantage; and looks to prevent legal problems occurring in the first place.

It should work with local authorities, voluntary sector, community organisations, court, tribunals and others to ensure that no person is disadvantaged through lack of legal advice, representation and assistance.

Every local authority should be statutorily required to produce an access to justice strategy which ensures access to legal advice, representation and assistance including qualified legal advice where required and which meets the needs of the community.

We need a law centre for every community in Scotland which is community controlled and is tasked with meeting the needs of both individuals and the wider community in Scotland.

We are calling for a redeployment of the PDSO's funding. It should be redirected to help victims of crime and to help those in need access civil justice in Scotland.

Areas of unmet legal need which traditionally have been almost impossible to obtain legal aid for – for example, local environmental cases impacting upon the wellbeing of individuals or the local community or indeed the ability of parents of school children to access rights to hold their local authority to account - should no longer be neglected.

We need to support advice and other staff across Scotland through specialist support units. Staff need specialist support to help advise and signpost their clients; and to assist them to develop their capacity to assist people and keep themselves up to date with legal advance and reforms. In particular we need specialist support services to cover welfare benefits, debt, employment, immigration, housing and homelessness, consumer, financial and money advice.

Particular groups of people also require specialist support - children, women, ethnic minorities, disable people and vulnerable adults. We need to improve our specialist support services which build the capacity of services across Scotland and can represent those with particular legal needs.

Local authorities, housing associations, and government agencies like the DWP and tribunal services should be instructed to work closely with community legal services to develop ways to prevent poverty and injustice and look at ways of intervening early to prevent homelessness and unfair dismissals from work, to know their rights when taking on debt and mortgages, to ensure they are getting full entitlement to benefits and public services.

We are calling for a new universal right and brand new service. The right of everyone to receive a 'Rights Entitlement Check' (REC). These 'legal health checks' should be carried out by professionals in exactly the same way as teachers carry out individualised learning plans and doctors provide health checks. Employers should be encouraged to do rights at work checks and health and local authorities can be given rights improvement impact tools e.g. sets of questions they can ask every client who contacts them.

INEFFICIENCIES IN THE PUBLIC DEFENCE SOLICITORS' OFFICE (PDSO)

The Public Defence Solicitors' Office (PDSO) is an expensive body that provides services already available, and provided for, within the criminal justice system. It does not satisfy an unmet need, by reason of the fact that there is very little unmet legal need within the field of Scottish criminal defence law.

It was established in 1998. It employs sixteen solicitors and has seven offices in Glasgow, Edinburgh, Dundee, Ayr, Falkirk, Inverness and Kirkwall.[7] Although it is the biggest criminal law 'practice' in Scotland it has the nationwide caseload of a medium ranking Glasgow criminal law firm. It is fully subsidized by the taxpayer. It is owned and operated by SLAB. SLAB regulates, audits and administers payments to independent criminal solicitors.

Were the PDSO a private independent law practice, operating in the same market conditions as all other independent private practices, then in 2009/10 it would have lost £932,000 and in 2008/09, it would have lost almost £1m.[8]

In summary criminal cases we estimate that the PDSO is **twice as expensive** as private practitioners, and in duty solicitor cases, **over 10 times as expensive** as private practitioners.[9]

There is also a significant disparity between the number of guilty pleas tendered on behalf of client's between PDSO and independent private practitioners. Some **63% of pleas tendered by PDSO solicitors on behalf of clients are 'guilty'** whereas the **average rate amongst the independent private criminal bar is 41%**.

In Glasgow, the **PDSO is responsible for twice the number of guilty pleas for accused persons**, proportionately, **as against independent, private practitioners in Glasgow**.

The only years when the PDSO was self-sufficient, were its first two years operating in Edinburgh (1998-2000), when it was compulsory for those born in January and February, who had been charged with a criminal offence (and sought the benefit of legal aid), to instruct the PDSO.

Such a requirement was, not surprisingly, successfully challenged under the European Convention of Human Rights (ECHR) as being unlawful. More recently, in Glasgow, SLAB has just issued a 'plan' for duty solicitors that will make it compulsory for those in custody from Friday through to Monday and who are without a solicitor, to instruct the PDSO. A similar ECHR challenge is likely to follow if the plan is implemented.

To make the PDSO viable on a comparable basis with private legal practices, a major diversion of case work, public sector investment and a fresh recruitment drive would be required to support an operation that has failed year on year in the last decade.

INEFFICIENCIES IN THE CURRENT CIVIL LEGAL ASSISTANCE OFFICE SYSTEM (CLAO)

In SLAB's 2009/10 Annual Review the costs of CLAO costs are listed £1,016,000 and the total number of CLAO cases as 493 (283 A&A; 2 ABWOR; 42 Children's; 166 Civil Legal Aid). This gives a per case figure of £2,060.85.

Overall, for 2009/10, net legal expenditure for Civil cases is noted as £47,192,000 and the total number of Civil cases is 121,585 (95,277 A&A; 4,280 ABWOR; 22,028 Civil Legal Aid). This gives a per case cost of £388. There is little doubt that CLAO can be restructured and harnessed to provide better value for money, and more effective and efficient services for local communities in Scotland.

Note

Membership of the Access to Justice Committee of the Law Society of Scotland includes solicitors, solicitor-advocates, advocates and non-lawyer members; 50% of the committee consists of non-lawyer members.

Members include: **Mike Dailly, Convenor, Patrick McGuire, John McGovern, Robert Sutherland, Frances McCartney, Dave Moxham, Danny Phillips, Geraldine Cotter, Bob Hay, and Phyllis Craig.**

Full details of the AJC's membership is available here:

<http://www.lawscot.org.uk/members/legal-reform-and-policy/legal-aid--access-to-justice/access-to-justice>

References

[1] <http://www.independent.co.uk/news/uk/politics/government-to-cut-further-1634bn-from-welfare-bill-2075410.html>

[2] http://www.lawscot.org.uk/news/press-releases/2010/september/news_20100920

[3] <http://www.heraldscotland.com/news/home-news/law-society-committee-to-seek-abolition-of-legal-aid-quango-1.1060914>

[4] Given the consequences of unprecedented welfare benefit and public funding cuts

we suggest it is uncontroversial to conclude that unmet legal need in Scotland will rise concomitantly.

[5] See para 1.15 of SLAB's Statement of Accounts published in December 2010;
http://www.slab.org.uk/publications/annual_reports/documents/20092010StatementofAccountsDec2010FINAL.pdf

[6] Schedule 1 to the Freedom of Information (Scotland) Act should be amended to ensure that all new legal aid regulatory bodies were subject to freedom of information.

[7] <http://www.pdso.org.uk/whereweare.php>

[8 & 9] The basis of our calculations are as follows:

- Summary criminal cases where Not Guilty plea entered: 55,882 grants by SLAB to independent solicitors. Payments made to solicitors excl VAT: £26.1M. Cost per case before outlays reduction: £467 (£411 after 12% outlay reduction).
- PDSO in 09/10 handled 592 summary cases, representing 30% of its overall caseload of 1,938. Its costs in 09/10 were £1.583m, then summary cases constitute 30% of that cost being £474,900. When that figure is divided by the number of cases, 592, then the average case cost for summary cases for the PDSO is £802. Nearly double.
- Duty solicitors plan. 19,821 cases were covered under the duty scheme in Scotland (by independent solicitors) at a cost of £1,191,300 excl VAT. Average duty case cost: £60 excl VAT.
- PDSO covered 1,215 cases as duty solicitors, representing 62% of its caseload. 62% of its costs are £981,460. Average duty case cost therefore undertaken by PDSO was this figure divided by 1,215 bringing £807 per case. The independent criminal lawyer is paid on average £60 per case.