

Access to justice for sale?

Govan Law Centre's contribution to the 'Delivering Excellence in Scotland's Civil Justice System Conference' – 20 June 2008, MacKay Hannah Public Policy, Edinburgh MacDonald Holyrood Hotel; Keynote speaker, The Rt Hon Lord Rodger of Earlsferry.

Any progressive system of justice should be accessible not just to the few or the many, but to everyone. Yet justice itself is increasingly being regarded by the Scottish Government and UK consumer watchdogs as a product or service for consumption. Which of our citizens can afford to purchase it?

It used to be that our civil legal aid system enabled those of modest means to access Scotland's legal system without fear of cost. But today, civil legal aid has become irrelevant for most citizens. The median household income in Scotland for 2006 was £18,668. Yet in 2007 the maximum "disposable income" threshold for civil legal aid was £9,781.

Most people are no longer eligible for any help at all. And even when people on low incomes do qualify for legal aid this is often subject to impossible and unrealistic conditions. To take two recent examples from Govan Law Centre's (GLC) experience.

- Ms Reid incurred rent arrears and was subject to an eviction action by her landlord. Her sole income was £98 per week from Incapacity Benefit. From this she also had to pay £25 per week on fuel bills. GLC applied for legal aid to defend the action.

The Scottish Legal Aid Board (SLAB) assessed Ms Reid as eligible for civil legal aid but only if she paid a financial contribution to SLAB in the sum of £738. Meantime, Ms Reid was told by her landlord it required £25 per fortnight towards her rent arrears and housing benefit shortfall. In practical terms, Ms Reid was not eligible for any meaningful help at all.

- Mr Ahmed sustained a serious injury in his home due to the negligence of his landlord. He sole weekly income was £150 and comprised of a retirement pension, disablement benefit and pension credit. He was assessed as eligible for civil legal aid but only if he paid a contribution of £2,020.¹ He was unable to afford this contribution.

The Board's own statistics show a steady year on year decline in the number of people applying for civil legal aid and the number of applications granted. Over the last decade civil legal aid applications and grants have decreased by almost 50%.²

For example, in 1997 there were almost 29,000 applications with around 20,000 granted while a decade later those numbers had fallen to just over 16,000 and almost 11,000 respectively.³

More recently, even applicants living on income support of £60 per week and assessed as having a nil financial contribution have discovered they might not be eligible for free help. Where a client on income support facing mortgage repossession obtains legal aid and successfully defends their case the Board now applies the 'preservation of property' rule.

In other words if the applicant's home has grown in value while defending the case they will be expected to pay their own legal bill. The fact the applicant is on income support with mortgage interest being paid for by the state, unable to borrow any money and unable to pay any loan even if they could borrow anything, seems to have been overlooked by the Board. We believe the application of this rule in mortgage repossession cases is subject to legal challenge and hope to do so soon.

¹ Since on or after 6 April 2007 pension credit is now disregarded for civil legal aid, which would lower Mr Ahmed's financial contribution (if he had been assessed under the new rules) to £1,228.

² Annual Report for 2005/06, Scottish Legal Aid Board:
http://www.slab.org.uk/annual_report_2005_2006/index.htm

³ The precise figures for 1997 were 28,733 applications with 19,797 granted; and for 2007 there were 16,291 applications with 10,982 granted:

http://www.slab.org.uk/publications/annual_reports/index.htm

But the fact that even those in poverty are no longer eligible for free legal help must reveal that all is not well with our system of legal aid.

Past annual reports from the Board have asserted that 'legal aid widens access to the justice system'. Yet from the evidence I have cited so far access seems to have regressed while bureaucracy has widened.

The overall legal aid budget has barely increased over the last decade, while the overall number of cases has decreased. Yet the running costs of the Board have risen by almost 100% between 1997 and 2007.⁴ In 1997 the Board's running costs were just over £7m administering a budget of £143m. A decade later and the annual running costs were up to almost £14m with a budget of £150m.

Legal aid expenditure is officially demand led and uncapped. Yet it might be thought what has happened is more public money has been diverted into bureaucracy and devices which have squeezed demand and restricted take-up.

Certainly we know there are less and less legal firms willing to undertake legal aid work. The Board confirms that in 2006 there were 736 firms registered for civil legal aid work, while in 2007 that number fell by 8 per cent to 678.

Even applying for legal aid has become very difficult. One only has to look at the Financial Eligibility 'Form 2'. That document is around 40 pages long, and requires the client to obtain financial documentation including wage slips, employers statement - often never returned by the employer – past council tax liability letters, child tax credits letters, proof of total debt owed and so on. If your client has a partner, then the amount of documentation is doubled.

⁴ Details of running costs are set out in the financial accounts appended to the Board's annual reports available here (and summarised as an appendix to this speech): http://www.slab.org.uk/publications/annual_reports/index.htm

Legal aid bureaucracy has grown exponentially over the last few years.

Often a client does not have the information now required by the Board and solicitors will have to write to local authorities, previous employers, and so on. The time and effort now required to obtain legal aid has become a major task in its own right.

Have we perhaps lost sight of the purpose of legal aid?

Govan Law Centre represents a large number of clients in receipt of Incapacity Benefit, many of whom have mental health difficulties. They are often visibly daunted when the Legal Aid checklist is handed over. Many clients fail to bring the information to their next appointment, or advise their bank will charge £5 a page for duplicate statements, or state they have requested duplicate information from the Inland Revenue over the phone to be told it cannot be provided. A significant number of clients never return with their financial information.

Why can't we dramatically cut administrative costs and paper work by delegating a degree of devolved responsibility to registered civil practitioners?

For example, for certain types of high volume cases and subject to a series of mandatory checks and criteria, registered firms could be empowered to provide legal assistance automatically. The Board could then undertake detailed regular inspections and audits to prevent misuse and the level of bureaucracy could be dramatically reduced.

This could improve the efficiency of public spending on legal aid, and divert scarce resources to provide additional front line services in the public interest. Certainly, we cannot go on funding an ever expanding bureauacracy while more and more vulnerable citizens are excluded from help.

While a relaxation of the level of financial contributions required from low

income applicants could widen access to justice in Scotland, this will not help those on median or reasonable incomes. Most people of median earnings cannot afford to raise or defend sheriff court proceedings for fear of cost.

That position will get worse later this year if court fees increase by up to 50% as expected.

Section 60 of the Civil Procedure Act 2005 requires the court in Australia's New South Wales to resolve disputes '*in such a way that the costs to the parties is proportionate to the importance and complexity of the subject-matter in dispute*'.

The Chief Justice of New South Wales concedes that this is a '*statement of ambition, rather than a description of what occurs*'.⁵ Yet it is ambition which politicians in Scotland should embrace.

Cost becomes an acute problem if a litigant has to risk more on potential legal expenses than the sum sued or opposed. For example, if a litigant has a breach of contract claim for over £5,000 and the matter proceeds to proof at the sheriff court, the pursuer may be looking at over £6,000 in expenses in the event of failure.⁶ Why would anyone assume this risk? Of course risk works both ways – would a defender really risk losing £11,000, or would they rather settle the case for a few thousand pounds plus expenses?

If in many cases it is uneconomic for citizens to access the civil courts, then justice is being denied. Interestingly, in our example, if the litigant was suing for £50,000 and the case proceeded to proof the risk of expenses would not increase. Accessing the sheriff court ordinary cause procedure will always cost a certain amount of money regardless of the value of the case. A

⁵<http://www.vicbar.com.au/WebData/GeneralFiles/Spigelman%20CJ%20Access%20To%20Justice%20And%20Access%20To%20Lawyers.pdf>

⁶ On the ordinary cause scale – this would include the cost of the litigant's own solicitors fees, the cost of the opponent's 'judicial expenses', and various outlays including short hand writers fees, based upon one day of proof. The sum could be much more if the case required several days of evidence, or was delayed or continued.

problem occurs when that cost is out of proportion with what is being claimed or defended.

One suggestion to resolve this difficulty has been to extend the sheriff court small claims procedure limit to £5,000.⁷ In England and Wales, the small claims limit has been raised twice – to £3,000 in 1996 and to £5,000 in 1999. In Scotland the limit was increased from £750 to £3,000 in January of this year.

Empirical evidence has confirmed that increases in England and Wales have only produced a minor uptake in claims – leaving aside the recent phenomenon of unfair UK bank charges claims.⁸ More importantly, research has concluded that “*the majority of small claims cases with a value between £3,000 and £5,000 involve commercial organisations suing other organisations*”.⁹

All of the evidence reveals that the small claims procedure has been a bit of a flop from a “consumer” perspective. Research by the Scottish Consumer Council in 2003 confirmed that only 7% of members of the public surveyed would consider using the small claims procedure for a consumer problem.¹⁰ The small claims procedure is fine for commercial debt collectors but is unpopular with ordinary citizens. Relying upon a scheme that has a narrow take up makes no sense as a means to open up access to the civil justice system.

⁷ John Home Robertson MSP and the Scottish Consumer Council have been among the most vociferous advocates for increasing the small claims limit to £5,000, while many lawyers (including the author) and the trade union movement have been opposed to any increase. See further: *Robbing the poor?*, Dailly, M, Journal of the Law Society of Scotland, November 2004 at page 28. Available online: <http://www.journalonline.co.uk/article.aspx?id=1001229>

⁸ Of which the author has acted as UK campaign solicitor together with Ray Cox Q.C. , Fountain Court Chambers, London, Martin Lewis of MoneySavingExpert.com, Marc Gander, Doreen Summers and others from the UK Consumer Action Group.

⁹ *Lay and Judicial Perspectives on the Expansion of the Small Claims Regime*, Professor John Baldwin, Department of Constitutional Affairs (2002)

¹⁰ *Knowledge of Consumer Rights in Scotland*, SCC (2003). Available online: <http://www.scotconsumer.org.uk/publications/reports/reports03/rp03know.pdf>

One solution to this problem could be to introduce a more informal and accessible third tier of civil jurisdiction. All 'non-contentious' payment actions could be taken out of the sheriff court (excluding personal injury and housing cases) and dealt with by a civil tribunal. This could include any claim for money up to £25,000 where the debtor did not proceed with a legal defence. Actions could still be raised in the sheriff court but where no legal defence or response was intimated by the defender the case could be automatically remitted to the civil tribunal.

The tribunal could be inquisitorial and have privative jurisdiction of consumer and unsecured debt contested disputes up to £5,000. It could incorporate the existing Debt Arrangement Scheme and include mediation services. Expenses could be fixed in order to ensure full access by all citizens. This would free up shrieval time and enhance the operation of the sheriff court.

I remain convinced that at the heart of the problems I have described is the insidious commodification of our public services. As I said at the outset of my contribution: justice itself is increasingly being regarded by the Scottish Government and UK consumer watchdogs as a product or service for consumption.

Is that approach helpful in improving access to justice? For example, if you can't afford the latest gadget, designer jacket or must have kid's toy the consequence of having to go without is trivial. Having to go without access to justice can mean a life in squalid dangerous housing, being made homeless and destitute, never seeing you kids again, or being locked up for a crime you never committed.

It's in the public interest to ensure that citizens are not mistreated, rip-offed or abused. It's in the consumer interest to ensure that those who have money can purchase what they want, while those who have goods can sell what they want. The two interests do not equate, yet our legal system is being 'consumerised' – the latest development being 'Tesco law' and the ability of international banks and supermarkets to own legal firms and act as the

gatekeepers to the court?

I believe radical change is necessary.

With the ongoing civil court review led by Lord Gill we have a vehicle for change, but I sincerely believe we must also review our legal aid system if we are truly committed to providing access to justice for all of our citizens.

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20 June 2008

APPENDIX

SLAB - Annual administrative costs (revenue and capital)

http://www.slabs.org.uk/publications/annual_reports/index.htm

1997 – (£143m) - £7.2m admin.

1998 – (£145m) - £7.7m admin (including new PDSO and compliance unit).

1999/00 - £7.6 million running costs – 1999/00 (excludes capital costs of 0.9m – legal aid spend £120m). Total admin = £8.5m

00/01 - £9.1m admin costs (including capital) (SLAB says 7% increase due to capital and due to 'spend to save initiatives') (£121m)

2001/02 – 330 full-time staff – (£127m) – £9.6m

2002/03 – (£135m) - £10.5m ('much was capital expenditure and spend to save initiatives')

2003/04 – (£146m) - £11.5m admin costs.

2004/05 – (£152m) - £11.88m

2005/06 – (£147.9m) - £12.99m - * legal aid expend down but costs up

2006/07 – (£150.2m) - £13.57m

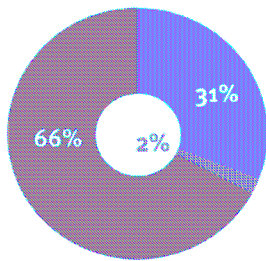
678 in 2007 firms for civil legal aid (736 in 2006)

97/98 criminal expenditure was £1.7m less than 2003 as to 5 years earlier in 1998.

Tables from the 2005/2006 SLAB annual report

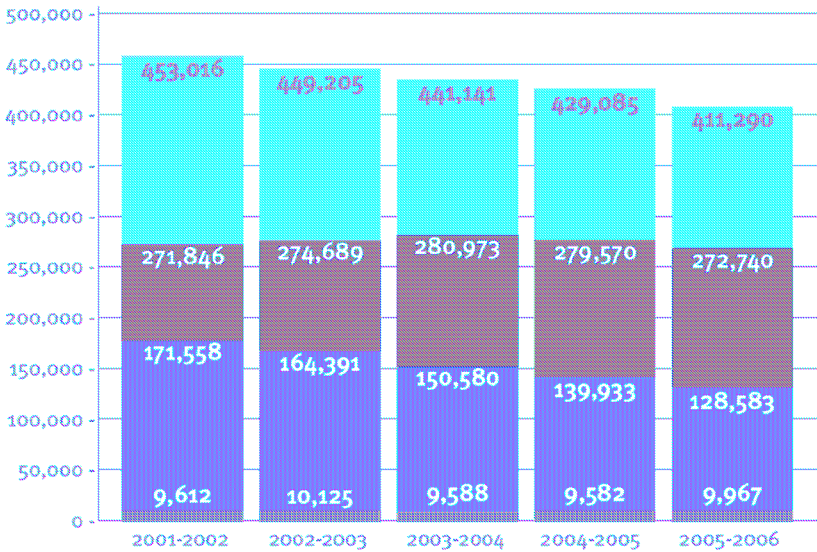
six years

- there were 128,583 grants of civil legal assistance, a reduction of 8% – although within this total the number of civil legal aid grants was largely unchanged, halting the falls seen in the last few years
- 9,967 grants were made for children’s legal assistance and contempt of court, a rise of 4% from the previous year.



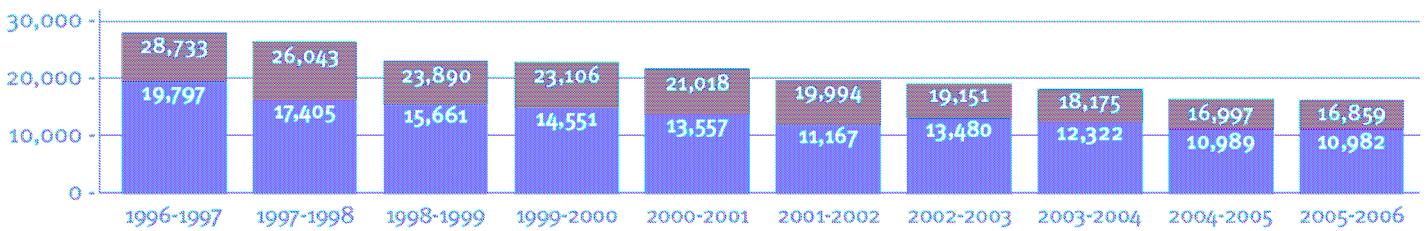
Grants 2005-2006
 Criminal: 272,740 grants
 Civil: 128,583 grants
 Children's and contempt: 9,967 grants

Legal assistance grants 2001-2006



■ Criminal legal assistance
 ■ Civil legal assistance
 ■ Children's and contempt legal assistance
 ■ Total legal assistance

Civil legal aid applications and grants



■ Applications
 ■ Grants