

## INTRODUCTION

The Scottish Legal Aid Board welcomes the publication of The Scottish Office Consultation Paper "Access to Justice - Beyond the Year 2000" ("the Paper"). Access to justice is of the utmost importance in a civilised society. Scotland has a legal system of which it can rightly be proud, but it is an expensive system which not all citizens can access. Traditionally, legal aid has enabled those of limited means to access the services of private solicitors for advice and assistance and to take proceedings in the civil courts. However, solicitors do not possess the same degree of expertise in all areas of civil law. Indeed, in fields such as housing, employment, welfare benefits and debt a variety of other providers has emerged, many of whom provide a wide range of 'legal' services.

The Board believes that we are entering a new stage in the development of publicly funded legal services. Alternative providers of information, advice and assistance and alternative methods of dispute resolution are gaining recognition and new ways of paying for legal services are being explored. The Consultation Paper recognises these developments and includes many of them within its pages.

### THE BOARD'S VISION

**The Board's own vision is of civil legal aid and advice and assistance being part of a comprehensive system which will enable members of the public to make informed decisions when faced with legal problems, to facilitate the resolution of disputes where this is necessary and to do this in the most appropriate way and at the most appropriate time.** The current system does not always do this in the most effective manner. What we have is a system which has developed in a largely *ad hoc* fashion, resulting in a fragmented and inconsistent pattern of provision. To quote the Lord Chancellor,

"[it is not] enough to take the easy approach of simply plugging the gaps as they appear - say, employ a few salaried lawyers here, open a new Law Centre there. That would do nothing to tackle the fragmentation of the current system .... by rushing to plug obvious gaps, we would be throwing away the opportunity to tackle the causes of unmet need, rather than the symptoms."<sup>1</sup>

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<sup>1</sup> Lord Chancellor's speech to Legal Action Group/Justice Conference on Making Legal Aid Work, at Church House, Westminster on Friday 3rd July 1998.

We need to take a flexible, coherent and, above all, holistic approach to the creation of a system which can provide appropriate services to a wide range of consumers with a wide range of needs. The Board recognises that an entire system cannot be revolutionised overnight and that it may indeed be unwise to attempt to do so. For this reason we believe that, while adopting a radical view, The Scottish Office should carefully pilot new arrangements as soon as possible so that more fundamental reforms can subsequently be made in an informed and controlled manner.

It must be stressed that legal aid, however broadly it may be defined, is only one part of the civil justice system. While reforms in legal aid may make access to legal services easier for many, the availability or otherwise of legal aid is far from the sole determinant of access to justice. **The Consultation Paper restricts itself largely to questions of civil legal assistance, but other reforms to the civil justice system as a whole could contribute greatly to an increase in access to justice.** For example, the Board would like to see reform of the small claims court. Raising the financial limits would allow access to relatively informal court proceedings for those who may be discouraged from asserting their rights by the formality and cost of the legal system. At the same time, however, the operation of the small claims court should be examined and more support should be offered to party litigants to ensure that the system meets its aim of providing access to justice for those who do not wish, for whatever reason, to use the formal courts. The Board will be making these points in its response to the consultation paper on small claims recently issued by the Sheriff Court Rules Council.

Before going on to address each of the issues raised by the Paper in turn, the Board would like to make two general points which apply to many of the proposals in the Paper. First, while we believe that the Board is the most appropriate organisation to fund or co-ordinate many of the proposed initiatives, this can only be done if the resource implications, both for the Fund and the administrative vote, are properly recognised by The Scottish Office. Implicit in many of the proposals is some revision of the Board's remit, which at present is fairly restrictive and certainly more so than that of our southern equivalent. If the Board were to take on a more strategic role in securing effective provision of the services proposed in the Paper, changes to the existing functions, roles and responsibilities of the Board would be required.

Second, the Board has a strong interest in ensuring the **quality** of all services funded by legal aid, including those which might come under our *aegis* as a result of the current consultation. **The Board believes that all clients, whether paying privately or through legal aid, should expect and receive a service of appropriate quality from their solicitor, lay adviser or mediator.** The Board, as a major funder of legal services, is in a good position to insist on quality standards, while the individual client, especially if funded by legal aid, may not be.

While different issues may apply to different service providers, we feel that, in the interests of clients and to ensure best value for tax-payers' money, we must, in consultation with the providers themselves, develop mechanisms for ensuring the quality of services provided and funded by legal aid.

## THE BOARD'S RESPONSE

### CHAPTER 2.: THE GOVERNMENT'S AIM

The Government has undertaken, amongst other things, "to improve access to justice by making better use of the existing legal aid budget". The Board believes that access to justice can and should be improved - preferably by making legal advice and services more readily available within the community along the lines outlined in this response. Adequate funding for the justice system is required and consideration should be given to increasing the existing civil legal aid budget in due course.

The Board sees access to information as of great importance and agrees with The Scottish Office that, through solicitors, both in private practice and in law centres, and through advice agencies, many citizens are given the information they need when faced with a wide range of problems. Nevertheless, there are clearly gaps in provision both geographically and in particular areas of law. It is, therefore, important not to assume that the present infrastructure can simply be expanded and adapted to meet the needs which are identified. Rather, we must take a strategic view of what services are needed and develop a blueprint for a community legal service which meets those needs.

Equally, it would be remiss of government to ignore the extensive resources which are available at present, many of which make no demands on the legal aid fund. **What is needed, therefore, is a holistic approach to the question of civil legal services which encompasses a broad range of providers without many of the constraints imposed by the present system.**

We believe that a range of services should be available to meet diverse needs and preferences when it comes to advice and dispute resolution. We recognise the vital role to be played by solicitors and courts where appropriate, but also see many opportunities for the public to access lay advisers or alternative methods of dispute resolution.

Reasonableness is of course a central concept in the legal aid system. Where this concept is applied to a broader system as some sort of 'gate-keeping' mechanism, it is important that those who make the decision as to what is reasonable do so in an appropriate, consistent and responsible manner.

### **CHAPTER 3.: COMMUNITY LEGAL SERVICES**

The Board agrees that various models for the delivery of community legal services should be piloted so that any future community legal service can be built on solid foundations. There must, however, be proper consideration of the longer term objective of piloting specific arrangements: what part in the overall plan for a community legal service will each form of provision play? What lessons can we learn from specific pilots in developing a strategic service?

#### **Question 1: Should solicitors employed by SLAB be located in advice agencies?**

The Board believes that the placement of solicitors in advice agencies, employed by SLAB under Part V of the 1986 Act, could be of great benefit to clients of the agencies involved. Careful consideration should be given to the exact function and role of solicitors employed by the Board and located in advice agencies. This is vital to ensure that all parties get maximum benefit from the arrangements. The Board will shortly be submitting detailed proposals for the employment of solicitors under Part V of the 1986 Act. These proposals have been drawn up in direct consultation with various advice agencies and thus reflect the priorities of each of those agencies.

In addition and as the Paper itself points out, a number of difficulties are likely to arise in relation to the management and employment arrangements for Part V solicitors. The Board recognises these potential difficulties but is confident that they can be addressed effectively and successfully. Indeed these are the kinds of challenge which can be addressed both in advance and during the course of piloting.

The Board believes that such pilots should be carefully monitored by independent researchers commissioned by The Scottish Office Central Research Unit.

Part V of the 1986 Act is restrictive in its terms and is not the ideal vehicle for the development of services involving both solicitors and advice agencies. Nevertheless, Part V can be commenced quickly, while any primary legislation introduced following this consultation exercise is likely to have to wait until at least the first session of the new Scottish Parliament.

The Board therefore believes that much can be learned in the interim from pilots introduced under Part V, but would not wish the constraints of the existing legislation to be replicated in new legislation and certainly would not wish the success or otherwise of such pilots to be viewed as negating the need for new, more flexible primary legislation. In short, Part V has much to offer agencies in the short term and the Board, agencies and The Scottish Office could learn a great deal about suitable structures for future services by piloting as soon as possible.

The Board would not, however, wish such piloting to prejudice in any way the introduction of new legislation which will allow solicitors and advice agencies to work together without the constraints posed by either Part V or present legal aid structures.

Further, while recognising that this particular proposal is predicated on the commencement of Part V, and therefore any solicitor employed for a pilot must be employed by SLAB, the Board does not feel that, in future, this should be the exclusive preserve of SLAB: other organisations should be able to employ solicitors and, under specified conditions, receive payment from SLAB to do so. This would remove some of the difficulties discussed above in relation to employment and management issues.

**Question 2: Should non legally qualified staff supply advice and assistance funded by legal aid?**

Non-legally qualified staff are already involved in the provision of what often amounts to advice and assistance, especially on matters on which solicitors in private practice are less likely to provide a service. The Board believes that such staff, in advice agencies or within solicitors' offices, should be paid for this work under legal aid. Of course, solicitors undergo many years of training in both substantive areas of law and in legal skills. However, this is not to say that a solicitor will necessarily be better able to provide advice and assistance to a client in need. As already mentioned earlier in this response, the Board would wish to be assured that the services being provided by non-legally qualified staff under advice and assistance were of a suitable quality.

The Board is keen to make clear that advice agencies should not be disadvantaged by the availability of legal aid money. This could happen if current funders reduce grants because the agency either attracts money from legal aid or has the potential to do so. The Board would not wish to see this situation arise, both because it could force agencies to rely on legal aid money, thus threatening other core services which grant funding supports, and because it would represent a simple shift of responsibility from one funder to another without increasing the level or range of services provided. The Board would thus work to develop a 'partnership' approach to provision, both between agencies and funders.

**Question 3: Are the pilot studies which are suggested appropriate? Would respondents wish to suggest any further models for piloting either within the Part V powers or under primary legislation?**

Each of the models detailed in the paper is both appropriate and sufficiently different to the other models to merit a pilot. There are also other models which could be piloted. For example,

while solicitors employed under Part V would be restricted to providing representation in the same proceedings as all other solicitors (and therefore representation in tribunals would not be permitted), they could help prepare cases for tribunals on behalf of clients. Solicitors employed under Part V could also train volunteers or lay advisers within agencies to carry out the representation itself. A range of other ideas could also be tested. For example, solicitors employed by the Board, who would be paid a salary rather than earning legal aid income on a case by case basis, would be able to experiment with different ways of providing legal services, including the development of non-casework services. A number of such ideas are presented below in answer to Question 7.

Arrangements for the pilots discussed in paragraphs 3.6.1, 3.6.2, 3.6.6 and 3.6.5 could clearly only be considered in consultation with the agencies which would wish to be involved: there would be little merit in developing projects which were not regarded as the best use of limited resources by the agencies concerned. In addition, as mentioned above, the Board would wish to encourage other organisations to make suggestions for pilot projects which they could run themselves.

While each of the individual models may be appropriate, the Board urges The Scottish Office to take a holistic, radical approach to the provision of community legal services. While recognising the importance of involving existing providers, it would be unfortunate if at this stage the government were to limit its vision of community legal services to that which can be 'bolted on' to the system which has developed over the years in a largely *ad hoc* fashion. It would make much more sense for a fundamental review of current service provision and future needs to be undertaken, following which a properly structured, holistic community legal service could be developed. The Government should be aiming to set out a comprehensive blueprint for the future rather than restricting itself to the incremental changes proposed in the Paper, however appropriate they may be in the short term. The best (and most sustainable) system would surely be developed following an assessment of the rationale for a community legal service, with the structure for the service following that rationale rather than simply being a consequence of current patterns of provision. By way of an example, a recent paper by the National Consumer Council (A Community Legal Service - The First Steps) sets out a broad vision for a community legal service. The paper does not answer all of the questions it raises, but it is a coherent attempt to look at how a community legal service should be structured, rather than at what can be achieved within the present pattern of provision.

**Question 4: Would contracting for advice and assistance be a suitable way forward?**

The Board supports a move towards contracting, provided methods are devised to ensure an appropriate spread of suppliers providing services of the requisite quality. In this way access to

justice can be maintained while providers benefit from the reduction in administration which contracts would bring. Contracts also have the advantage of allowing both solicitors and agencies to plan their services efficiently in the knowledge that regular payments will be made throughout the year, rather than depending on the volume of work in any particular week or month.

**Question 5: What would be the best way of assessing need for legal services in different areas?**

A combination approach, involving the use of statistical indicators alongside input from agencies working in the field, is a sensible way of identifying need. It enables the identification of areas of need and some form of quantification of that need. The Legal Aid Board in England and Wales is involved in such activities at present and we should be prepared to learn from this experience.

In addition, the Board notes with interest the recent Report of the Community Planning Working Group<sup>2</sup>. This Report sets out proposals for councils, public sector service providers and the private sector to work more closely together to ensure that the services provided for communities reflect the needs and wishes of those communities and that the level of services provided is optimised through greater co-ordination amongst agencies. This model would appear to have much to commend it to those attempting to determine the best way to prioritise the provision of legal services in particular localities.

**Question 6: What types of civil legal advice and assistance are best suited to contracts?**

Most types of legal advice and assistance are suitable. While it may be inappropriate to include areas such as medical negligence (which tend to result in expensive and lengthy cases) within a standard contract, such cases may still be contracted for: the Legal Aid Board has developed a separate system for contracting high cost cases and the same principle could be adapted for high cost advice and assistance cases.

**Question 7: What innovative methods of providing information and legal advice would respondents like to see introduced?**

Leaflets, telephone helplines and information provided on the internet and via public libraries could all help to increase access to legal information. While some of these sources of information could promote self help, others could offer a diagnostic service, determining the

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<sup>2</sup> The Stationery Office, J18599 6/98

existence and nature of a dispute and referring the client to an appropriate agency for further help if necessary.

The Board feels that, given appropriate resources being made available, there are many possibilities in the field of community legal education. Solicitors could be employed to visit schools to advise young adults on their rights and responsibilities. In addition, the running by specialist solicitors or advisers of courses, seminars and conferences in the community may be an effective way of reaching people before any dispute arises. This type of provision would build on the educational role of law centres, but whereas law centres are involved in these activities along-side casework, employed solicitors could adopt a more strategic and focused approach. Clearly, there are many possibilities for a cross-agency approach to the piloting of initiatives in community legal education: indeed, it would be best to develop services in consultation and collaboration with other bodies.

The pilot In-Court Adviser at Edinburgh Sheriff Court has recently completed its initial period of operation. The research suggests that this has had a significant impact on the parties who have been assisted by the adviser. This service could be extended to other courts.

Clearly, many different approaches can be taken to the provision of community legal services. The Board believes that a number of these approaches should be piloted. Indeed, it might be possible for a SLAB law centre, as proposed in the Paper, to develop a number of these models itself and then implement and evaluate them.

**Question 8: Should pilots of the provision of advice and assistance by advice agencies be confined to areas where the vast majority of applicants would be eligible on means?**

Piloting in an area where most people would be eligible does not solve the problem of eligibility for any subsequent permanent community legal service. This is a complex issue. Introducing tests of eligibility to many advice agencies would indeed involve “a significant culture change” which is likely to be resisted. It would also lead to inequitable situations whereby one group of clients was charged for a service while others received a similar service free. In addition, the prospect of a means test may be off-putting for many potential clients of an agency, which might well lead to a reduction in access. These problems would need to be addressed during the course of the pilot to determine a workable approach.

The Scottish Office might like to consider whether it would be better to allow universal eligibility for advice and assistance for the course of the pilots, during which time it would be possible to assess the extent of take-up by those who would be unlikely to qualify for advice and assistance. It is worth remembering that the pilots would only relate to civil advice and assistance and would probably be aimed, in the main, at the fields of social welfare law. The

very nature of the queries which would be handled is likely to restrict them largely to those who would qualify, or almost qualify, for advice and assistance. Universal eligibility would be unlikely to increase the budget greatly, would avoid the problems associated with means tests in general, would be more acceptable to the agencies likely to be involved in the pilots and would avoid the need for agencies to handle money (which they would if contributions were chargeable).

The question of eligibility is one which is of great concern to agencies. For any system to work beyond the pilot stage, it is an issue which must be tackled. The government must decide whether it is willing to increase eligibility for certain services, or make them universally available, or alternatively look to agencies which are willing to adopt a new approach to questions of eligibility. This may involve the creation of new agencies which are specifically designed to be part of a community legal service, rather than an adaptation of agencies such as the Citizens Advice Bureaux which were never intended to provide legal advice as such but have taken on that role in the absence of any accessible alternative.

#### **CHAPTER 4.: THE MERITS TEST FOR LEGAL AID**

**Question 9: Are the current merits tests for civil legal aid adequate?**

**Question 10: If the answer to Question 9 is "no", should the "probable cause" test be dropped leaving only a test of reasonableness? Or should any other change be made?**

A single test of reasonableness is all that is required. The separate test of *probabilis causa* is unnecessary as it is itself a component of reasonableness.

#### **CHAPTER 5.: MEDIATION AND LEGAL AID**

**Question 11: Should there be piloting of arrangements whereby those who might be eligible for legal aid for a prescribed class of family actions are required to be assessed for mediation through an intake interview with a family mediation organisation?**

**Question 12: Should there be piloting of arrangements whereby mediation is funded by legal aid and available from the outset of a prescribed class of family action?**

The Board has repeatedly stated its support for mediation as one method for the resolution of disputes. Quite apart from any possible savings to the legal aid fund which the early successful use of mediation may allow, there is evidence that the agreements which are reached are more durable than those imposed by a court. In addition, mediation brings other benefits to the

parties, often making the process of divorce or separation and the making of arrangements regarding both children and financial matters less traumatic.

The Board would like to do all it can to encourage the use of mediation and indeed has for the past three years made legal aid available for mediation, charged as an outlay on a solicitor's account. Unfortunately, both the use and provision of mediation services, especially in the all-issues area (i.e. involving financial as well as child related issues), has remained disappointingly low. Research suggests that mediation is most likely to be successful if it is entered into voluntarily and in the earlier stages of the separation process: in other words, before the parties' positions have become too entrenched. However, mediation is often entered into at a later stage, either at the suggestion of a solicitor or a sheriff using the Rule of Court referral. In the latter case, by definition, legal proceedings have already begun and have become defended. This is certainly not to say that mediation cannot succeed in these circumstances: it can and often does. However, it may be better not to wait until this stage has been reached and rather bring the parties together at an earlier stage.

An additional problem is that, if one relies upon solicitors and sheriffs to refer parties to mediation, practices vary between different solicitors and sheriffs. Some solicitors are keen on mediation and will refer as they believe it is in their client's interests, while others refer because they think it will look better to the sheriff when the case eventually comes to be decided by the court. In the latter situation, parties may attend mediation with a very negative attitude: an attitude which may have been encouraged by the solicitor. Likewise, some sheriffs refer almost all defended family actions at a very early stage, while others wait, using mediation simply as a way of getting entrenched disputes out of the court setting. Part of the problem is that knowledge and experience of mediation is not shared equally by all solicitors and sheriffs: where opinions and knowledge vary so widely, the result is inconsistent access to mediation across the country.

If The Scottish Office and other interested parties wish to increase access to and use of mediation, those who are in a position to influence parties' opinions need to be better informed. Even relying on better informed solicitors and sheriffs may not be enough if the ideal situation is to get parties to mediation before they have a legalised dispute. The general public must also be made more aware of the value of mediation: many people are unaware that the option exists and many of those who do tend to view it as a secondary option, as might be expected in a society in which the types of problems facing these parties have been inextricably linked in people's minds to lawyers and the courts. Automatic referral to mediation would certainly expose more people to the idea of mediation and may help instigate the kind of culture change which would appear necessary for mediation really to take off. However, the question of

compulsion is a sensitive one. Many would argue that mediation cannot be forced on parties, yet this is *de facto* what is done in many cases already.

The value of a pilot which actively encouraged parties to attend an intake interview is that it would allow a fuller assessment than has thus far been possible of the benefits and costs of mediation and the situations in which it is appropriate. This would in turn allow the development of appropriate mechanisms for the provision and future funding of mediation services.

Intake interviews are conducted at present by FMS, while CALM mediators receive a form filled in by each party before a mediation as such takes place. This mechanism allows either party to reveal the kinds of issues, such as violence or power imbalance, which enable the mediation service to determine whether or not mediation is appropriate. If mediation is not deemed appropriate, parties should certainly not be compelled into taking part. Any compulsory intake interview would have to be free.

Direct legal aid funding of mediation would be a huge step forward in encouraging parties to consider this option. The proposed pilot would differ from that currently being run by SLAB in that the parties could approach the mediation service direct and be able to access the service, funded by legal aid, without having first to engage the services of a solicitor. Thus early voluntary mediation would become accessible and this is often when mediation is most successful.

In conclusion, the Board agrees that new arrangements for the provision and funding of mediation should be piloted. A number of details would require to be carefully thought through, relating, for example, to the types of disputes to be included in any pilot, the stage in proceedings at which intake interviews are introduced and the mechanism by which this is done.

**Question 13: Do respondents consider that there should be any compulsion on a party to participate in mediation once judged suitable?**

This is a very difficult and sensitive question. As long as the intake and assessment process was thorough and reliable, it does not appear unreasonable to expect those who are deemed suitable for mediation to go ahead and take part. However, it may be that such enforced mediation would be less likely to succeed than that entered into voluntarily.

Another objection may be that, unless mediation becomes a pre-condition for use of court time for certain family matters, rather than simply a pre-condition for legal aid availability, compulsory mediation will introduce one rule for the poor and another rule for the not quite so

poor. If a non-legally aided opponent refused to mediate, the party applying for legal aid could clearly not be denied legal aid on the basis that mediation had not been attempted.

**Question 14: Should it be necessary to apply for further legal aid for a family action after receiving legal aid from a mediation organisation, on approaching a solicitor?**

If legal aid were made available for mediation, as suggested at Question 12. above, a certificate obtained for mediation should not automatically be extended to cover legal proceedings. The test of reasonableness to be applied to an application for assisted mediation may well be exercised differently to that for legal aid to raise court proceedings.

**Question 15: What would be the best way of assuring quality in the provision of intake interviews, and of mediation?**

A universal set of standards should be applied to all bodies offering mediation services. Only properly accredited mediators and interviewers should be able to attract legal aid funding. The UK College of Family Mediators is working towards such a scheme of qualification and accreditation and has published its own Code of Practice. The Board would have to be satisfied that the terms of such a Code were stringent enough and that they were adopted consistently by mediators, perhaps involving some form of monitoring of the bodies involved.

**Question 16: The Government would be interested in the views of respondents as to what initiatives might be considered on non-family mediation and in what sectors of dispute resolution activity?**

The Board is pressing ahead with a non-family mediation pilot, which will operate in a similar manner to that in place at present in family mediation. The Board expects that cases will arise under this pilot mainly in the field of reparation (as this is one of the main fields of activity for the mediators who are to be involved), but there is no reason why other areas should not also be covered.

## **CHAPTER 6.: MEANS TEST, CONTRIBUTIONS AND RECOVERY**

**Question 17: Should family credit and its replacement, Working Family Tax Credit, be excluded from the assessment of disposable income? What would be the justification for this?**

If the position suggested in the question were adopted it would mean that those in receipt of Family Credit would be placed at some advantage over those in a similar financial situation but without children. However, the interplay of the different regulations for advice and assistance

and civil legal aid makes the differing treatment of Family Credit somewhat contradictory. It is possible for a case to be prepared under advice and assistance, possibly at substantial cost to the Fund, only for the same party, with no change in circumstances, to be assessed with a substantial contribution for any subsequent proceedings. A number of such inconsistencies exist as regards the treatment of benefits: the Board suggests that these are reviewed and the regulations and Act rationalised in new primary legislation.

**Question 18: Should solicitors be given responsibility for collecting civil legal aid contributions?**

The collection of contributions by solicitors has obvious attractions from the Board's point of view. There, would, of course be administrative details which would have to be considered. For example, arrangements would need to be made to deal with the right of each solicitor to collect contributions following a transfer of agency. Moreover, solicitors at present can encourage clients to continue paying contributions by informing them that the Board will remove legal aid if they do not. If solicitors were to be responsible for collection of contributions, it is possible that they would come under pressure from clients to continue acting despite contributions having fallen into arrears.

On the other hand, there are clear advantages for solicitors in taking on this responsibility. At present, if an assisted person defaults on a contribution installment, the certificate is withdrawn. If solicitors were responsible for the collection of contributions, the decision as to whether to cease acting would rest with him/her. Thus a solicitor who had carried out a considerable amount of work on a case which was nearing conclusion would be able to complete the case even if the client defaulted on a payment. The solicitor would also be free to make flexible installment plans, thus meeting some of the criticism which has been leveled at the current contributions system.

**Question 19: Should solicitors be given responsibility for receiving Principal sums and disbursing the balance once the legal aid account is settled to the client?**

The collection and disbursement of Principal sums by solicitors would have significant advantages for both the Board and clients. The Law Society's accounting rules ensure that private client money is handled properly: this proposal would simply be a logical extension of the solicitor's current responsibility and would simplify procedures from both the solicitor's and client's perspectives. There would also be considerable administrative savings for the Board.

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**Question 20: Should a system similar to England and Wales be adopted whereby a client who is required to pay a contribution is liable for 1/36 of annual disposable income for each month the case continues?**

The Board believes that the current level of contributions is too high and suggests that The Scottish Office should consider lowering them. This might contribute to a reduction in the number of rejected offers of contributory legal aid. Indeed, the Board's own research has found that it is the overall level of contribution rather than any particular arrangements for payment which leads people to rejecting their offer. Nevertheless, the Board is currently running a pilot whereby a number of clients will be given the opportunity to pay contributions over a longer period than at present.

We believe that the system in use in England and Wales, whereby the client pays 1/36 of disposable income for each month the case continues, results in clients paying just as much as under the current Scottish system. However, no information is presented in the Paper about the operation of the English and Welsh system (Confloc). In 1996, LAB published the findings of its research into reasons for refusal of offers of contributory civil legal aid<sup>3</sup>. The researchers found that, of those who refused such an offer, 80% might have been willing to accept an offer involving a smaller contribution and 63% reported that one factor in their decision to reject their offer was that they would have to pay contributions for as long as the case lasted (p.17) The Board would not, therefore, recommend any move in this direction until the Board's pilot of an extended period for repayment has been concluded and evaluated and positive evidence emerges from south of the border on the operation of the system in use there.

**Question 21: Should a new system of contributions be introduced under which applicants would pay a percentage of estimated case costs, reflecting disposable income, to be adjusted on submission of the final account?**

The Board believes that this type of system would be excessively complex, administratively onerous and possibly unworkable.

**Question 22: Is the present system for granting civil legal aid in urgent matters satisfactory?**

The Board believes that the present arrangements work well in a majority of cases. However, the Board is aware that certain aspects of the system cause problems for some client groups,

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<sup>3</sup> Woolfson, R and Plotnikoff, J (June 1996), *Report of study into reasons for refusal of offers of contributory legal aid*, Legal Aid Board, London.

for example victims of domestic violence. In particular, such clients may be asked by their solicitor for a substantial payment "up front" to cover the urgent work. Solicitors may take this step because, under the present arrangements, the client is not in receipt of legal aid when the urgent work is done. Where no application is made after this work has been completed (e.g. where the parties reconcile) the solicitor's only source of payment is the client. It is, therefore, very important that an application for civil legal aid is made: if legal aid is subsequently granted, the solicitor can be sure of full payment from the legal aid fund for the work carried out prior to the grant.

Even if legal aid is refused the solicitor can be paid under arrangements approved by the Secretary of State. The Board, however, can only pay the account after deduction of any contribution that would have been payable had legal aid been granted. Accordingly, in cases where the solicitor believes that the client may be liable for a contribution, or considers that the client may not proceed to making an application for legal aid (in which case payment is essentially a private matter between the client and the solicitor), the solicitor may require payment to account before undertaking urgent work.

It may, of course, be very difficult for many clients to pay the sums required in a lump sum (this may also be a problem for many assisted persons assessed with a contribution, which is why the Board at present allows payment by installment).

While recognising these problems, the Board believes that a return to the former system of emergency legal aid would be a retrograde step. The former system, whereby solicitors could apply for legal aid and be covered for a limited period, was administratively burdensome for all concerned. The Board has made great improvements in the last few years in the time taken to process applications for civil legal aid. If the Board were required to process emergency applications in addition to applications for civil legal aid, it is likely that the time taken to process the former would be little different to that taken for normal applications at present. In addition, the turn-around time for all other civil applications would undoubtedly be affected. One particularly serious aspect of this problem would be that solicitors, who at present can carry out work under the special urgency provisions without awaiting a response from the Board, would be unable to act for clients until their applications were processed. There would, therefore, be considerable disadvantages in a return to the old system for clients, solicitors and the Board.

To summarise, the Board recognises fully the difficulties posed by the contributions aspect of the current system and agrees that this needs to be tackled, but would certainly not recommend a return to the former system of emergency legal aid.

## **CHAPTER 7.: ALTERNATIVES TO LEGAL AID**

### **Question 23: Should a Contingency Legal Aid Fund be considered for any class of civil legal aid?**

The Board has seen little or no evidence to suggest that a Contingency Legal Aid Fund would offer advantages over the current system of funding monetary claims. As the Paper itself points out, this part of the legal aid scheme is largely self-financing at present and, given the complexity and start-up costs, a CLAF would not appear necessary.

### **Question 24: Should conditional fees schemes such as Compensure be developed further by the legal profession to assist more clients who might otherwise apply for legal aid at greater cost to themselves?**

Without knowing whether schemes such as Compensure have operated satisfactorily to date, it is very difficult to answer this question. However, the schemes offer both a voluntary alternative to legal aid for those who qualify and an opportunity to access the legal system for those who would otherwise be unable to afford to do so. The Board would, therefore, welcome the further development of such schemes.

### **Question 25: Should legal aid be withdrawn from certain classes of civil actions if conditional fees schemes covering them can be put in place?**

Given the largely self-financing nature of the very actions for which conditional fees are proposed, the withdrawal of legal aid from these cases would not appear necessary. Nothing at present prevents a client from entering into a conditional fee arrangement. While the system is voluntary, a number of the pitfalls of a compulsory scheme are avoided. For example, a successful client under a conditional fee arrangement could end up paying more out of damages than would be the case under legal aid, because of the uplift in the solicitor's fee. If the system remains voluntary, this would be the client's choice. If a client cannot find a solicitor willing to take the case on a conditional fee basis, or if the client would prefer to pursue the case funded by legal aid, the Board should continue to grant legal aid to eligible clients where it would be reasonable to do so, that is in the same circumstances as at present.

### **Question 26: Should any success fee be paid by the losing party?**

Given the Board's answer to the previous question, we believe that conditional fee arrangements should remain a private matter (albeit subject to appropriate regulation by the Law Society). However, the Board's feeling is that a success fee should not be borne by the

losing party, largely because of the implications which such a system may have on insurance (and cross-insurance) costs.

## **CHAPTER 8.: VALUE FOR MONEY**

### **Question 27: Should fixed payments be introduced for civil legal aid?**

Civil cases can demonstrate a diversity and often a complexity not commonly found in criminal matters, especially those dealt with under summary procedure. Different considerations must therefore come into play when dealing with an issue such as fixed fees. Nevertheless, the Board believes that fixed fees offer the best opportunity for controlling the legal aid budget, for forecasting overall costs in advance and for reducing administrative complexity.

To take account of the complexities, different arrangements could be introduced for different types of civil case. For example, a single fixed fee might be appropriate for all work on some types of case (for example undefended actions). In other cases, separate fixed fees might be available for blocks of work carried out at different stages of the case. The Board believes that, approached in this flexible manner, fixed fees have much to offer.

### **Question 28: Should controlled fees be considered for civil legal aid?**

Controlled fees do not offer the same control and predictability as fixed fees and offer no administrative advantages over the current 'time and line' regime. As such, they are very much a second-best option behind fixed fees when considering reform of the legal aid feeing structure.

### **Question 29: Should a system be piloted whereby a legal aid application must be submitted with an estimate of what the nominated solicitor considers the case will cost, with that estimate if approved becoming a ceiling on what SLAB will pay?**

### **Question 30: Should there be a requirement on applicants for 2 estimates to be sought before a civil legal aid application is made?**

### **Question 31: Should SLAB be empowered to substitute a lower ceiling for the estimate, in making an offer of legal aid?**

### **Question 32: What should be the position of a client whose estimate is refused, or whose solicitor refuses to act for a reduced estimate? Should SLAB be empowered to offer the client an alternative solicitor who will act?**

We believe that the system of estimates is fraught with difficulty and is administratively complex. Research by the Legal Aid Board Research Unit has shown that it is very difficult to offer any reasonable assessment of the costs of a case at the outset. Further, evidence from other jurisdictions is not encouraging. The legal aid system in New Zealand is based on estimates and within six years of operating the system there has become crippled by rising costs and overspends.

We do not, therefore, believe that it is worth experimenting with a system of estimates, especially since they would be rendered largely obsolete by the introduction of contracting.

**Question 33: Should the longer term aim be to introduce a system of contracts for civil legal aid, with flexibility to accommodate both "one case" and bulk contracts? How should the need and level of services which SLAB would require to purchase under contracts be assessed?**

The Board believes that contracts offer significant advantages to all parties involved, including solicitors and clients. Properly monitored, contracts would enable the Board to ensure that clients have access to legal services wherever they may live. In addition, contracts can be made with specialists to ensure that the services offered are of the highest quality. The Board would wish to take a flexible approach to the awarding of contracts to maintain a diversity of supply. In short, the Board sees contracts as a way of maintaining and enhancing choice, access and quality in legal aid services.

LAB has addressed in detail the question of single contracts for high cost or multi-party actions, looking at ways of contracting for generic work and competitive tendering for individual cases. Treating such actions separately improves the fairness of contracts: the 'swings and roundabouts' theory cannot compensate when there are too few cases of a particular type, so these are not suitable to be dealt with under a general contract.

As indicated in the response to Question 5. above, the Board believes that a combination approach to the assessment of needs should be adopted.

## **CHAPTER 9.: EXTENSION OF NEW CRIMINAL LEGAL ASSISTANCE ARRANGEMENTS TO CIVIL LEGAL ASSISTANCE**

**Question 34: Would the introduction of a code of practice for civil legal assistance be of benefit to legal aid applicants?**

The Board believes that quality assurance for clients is as essential in civil matters as it is in criminal matters. We therefore consider that a Code should be introduced for civil legal assistance.

**Question 35: If a code of practice is to be introduced, should it cover all civil legal assistance cases, or should it be confined to particular classes of action, such as family actions?**

There can be no real theoretical justification for insisting on quality assurance for some cases but not for others. Differentiating between different types of case would also be complex and could lead to some categories of work being avoided by the profession in favour of others. For these reasons, the Board believes that a Code of Practice should cover all civil legal assistance.

**Question 36: Would it be right for the provision of civil legal assistance (or any defined class of such assistance covered by a code of practice) to be confined to solicitors, firms, and other groups and professions, on a register, the condition for inclusion on which would be compliance with such a code?**

As already stated, the Board considers a Code of Practice to be essential to ensure the quality of service provided to clients. However, to be effective such a Code of Practice must be mandatory. As with criminal legal assistance, the Board believes that a register of providers who comply with the Code of Practice, including solicitors and any other groups who may come to provide civil legal assistance following this consultation, provides an effective focus for monitoring the quality of the legal services provided.

There are no questions in the paper relating to the final four sections on directly employed solicitors, fixed payments, contracts and powers of investigation. Many of these proposals are covered elsewhere in the paper, and the Board would like to re-state its support for each of these developments.