

Legal Profession and Legal Aid (Scotland) Bill Debate - Thursday 7 September



Information on the Bill, Advice for All consultation and legal aid

In advance of the Stage 1 debate on the Legal Profession and Legal Aid (Scotland) Bill, this briefing by the Scottish Legal Aid Board provides MSPs with some background information on a number of the proposals in the Bill, other proposals contained in the Advice for All consultation and other current issues and activity relating to publicly funded legal assistance. The briefing does not relate to other aspects of the LPLA(S) Bill, such as those relating to complaints against lawyers. We have set out a few specific matters that we believe are of particular importance, which we hope will assist you in preparing for the debate.

Advice for All and the LPLA(S) Bill

The provisions in the Bill on legal aid are one of the ways in which Ministers are taking forward the outcomes of their 2005 Advice for All consultation, which itself drew on the recommendations of the 2004 Strategic Review of Legal Aid, Advice and Information in Scotland. Ministers have already indicated that other aspects of the consultation will be taken forward in other ways, such as by regulation or through administrative change.

We welcomed both the consultation and the Bill and are working with the Executive to develop this wider programme of work.

Towards a more planned and diverse landscape of advice

Advice for All set out a series of linked proposals to address a number of the commonly recognised shortcomings in the funding, planning and delivery of publicly funded legal assistance in Scotland. Publicly funded advice is provided by solicitors and advocates through legal aid and by a wide range of other advisers funded in other ways.

These advisers may be employed by local authorities, such as welfare rights officers, or may work within the voluntary sector, such as Citizens Advice Bureaux, local independent advice agencies or national organisations such as Shelter. This advice is funded in a variety of ways, often by local authorities, but also by lottery funds, charitable trusts and direct charitable donations.

There is currently no mechanism for the strategic planning and management of this range of supply to meet identified demand.

This was brought out by the Justice¹ Committee Legal Aid Inquiry in 2001. Most other countries have such co-ordination and planning mechanisms, to ensure there are no gaps in provision, and to ensure that the taxpayer is getting best value from the funding invested in the wide range of legal advice services.

Our work in recent years with the Executive, local authorities, the legal profession and the advice sector has highlighted a **significant need for improved coordination of all of these services in Scotland**, whether funded under legal aid or otherwise, to pursue a better fit between need and supply, better value for money and better services for those with legal problems. **We see this as a priority for action.**

The Board's existing statutory powers do not enable us to ensure that there are sufficient services available to meet identified demands. The legal aid system is reactive, relying for the most part on private practice solicitors to provide particular services.

As part of the vision of a planned and coordinated system, Advice for All proposed that **the Board should be given the ability to respond to needs in a number of ways:**

- **by entering into contracts or other block funding arrangements with solicitors or other advisers**
- **by providing grants, and**
- **by directly employing solicitors to provide advice, assistance and representation.**

We believe that this combination of approaches, alongside the current legal aid system and joint working with other funders and providers, is the best way to ensure that the availability of services is matched to the need for those services.

Funding of services provided by non-lawyer advisers

The Board has long called for the legal aid system to recognise the expertise of a wide range of advisers by providing funding beyond the traditional legal aid schemes, which focus only on services provided by lawyers.

As part of a more co-ordinated system, we believe that we should be able to fund services provided both by lawyers as at present and also by other advisers where appropriate.

The Board's preferred approach would be to do this through grant funding, which is how most of the advice sector is currently funded. The Bill as introduced recognises the role of non-lawyer advisers by giving them access to the existing advice and assistance scheme. While we agree that this may be a useful fall-back provision, we do not see it as contributing greatly towards more planned and diverse provision.

Our joint stakeholder consultation, carried out with the Scottish Executive earlier in Stage 1 of the Bill's passage, strongly suggests that the advice sector shares our view. We were therefore pleased that the Deputy Justice Minister recognised this in his evidence to the Committee and look forward to working with the Executive to develop proposals for a grant-funded scheme, should the necessary powers be provided for by way of amendment to the Bill.

The Board's view is that all publicly funded legal assistance, whether provided by lawyers or other advisers, should be quality assured.

The Bill requires the Board to develop a Code of Practice, which will form the basis of a register of advice organisations eligible to provide advice and assistance. We are currently developing an initial draft of this Code, and will consult widely with the advice sector before finalising it. If the Bill is amended to enable us to provide grants, we will also ensure that robust quality assurance is in place for any grant-funded services.

Civil legal aid

There have been significant changes in civil legal aid over the last three years. In particular:

- civil legal aid fees were increased and restructured, moving to a block fee system which simplifies the accounting process for solicitors
- we simplified the process for solicitors gaining approval for additional funding for experts
- we started dealing directly with applicants on financial eligibility, instead of solicitors doing this
- with the law Society of Scotland, we introduced a peer review-based quality assurance system.

We know that some solicitors do not feel that the changes have delivered the expected benefits. Our own comparison of a large sample of accounts submitted by solicitors under the new fee system strongly suggests that **for the majority of cases, the block fee system has delivered an increase in fees.**

However, we are particularly aware from discussions with solicitors and our own costing work that the system does not appear to reflect the complexity of some long running family cases and that some solicitors have decided not to take on such cases as a result.

Availability of solicitors providing civil legal assistance

The number of firms providing civil legal assistance has fallen continuously over the last eight years. There was a particularly sharp fall between 2003-2004 and 2004-2005, but numbers remained relatively stable in 2005-2006.

The reduction in applications for civil legal aid that started in 1994 also continued immediately following the reforms in 2003, but 2005-2006 is the first year since 1994 that there has been virtually no reduction in applications. We continue to see substantial reductions in civil advice and assistance.

There is some anecdotal evidence that solicitors may now act privately for some clients they might previously have represented under legal aid, for example if the client has a large contribution to pay or is likely to recover a large amount of money as a result of the case.

There are very many committed solicitors and firms who continue to provide a legal aid service in most parts of the country.

We appreciate that for many of these firms, other kinds of work may be more profitable than legal aid and that they continue to provide a legal aid service for a combination of commercial and philosophical reasons. At the same time, some firms (both large and small, urban and rural) have increased the amount of civil legal aid work they are undertaking and for some, civil legal assistance will be a major and growing source of income.

However, the Board remains concerned that there are some types of case in which the fees regime does not adequately recognise the level of work required.

We are also seeing increasing evidence that there may be some areas of the country where there are too few solicitors available to meet the demand for civil legal aid services. This is most likely in rural areas, where there may only ever have been two or three firms providing a civil legal aid service.

In some areas, particularly in the north and the islands, there may now be only one firm offering a legal aid service. Although in many cases solicitors from further afield provide a service, this is not ideal and there appears to be a risk that some clients will be unable to find solicitors, particularly for clients who are unable to travel.

There are a number of ways in which we believe the current situation could be improved, both in rural areas and elsewhere:

- we believe that **some improvements need to be made to the block fee structure**. We have already made recommendations to the Scottish Executive for a number of changes which Ministers have agreed in principle. We hope that the necessary regulations can be put in place in early course.
- more work needs to be done to see whether long running family cases require further changes to the feeing arrangements.
- **the proposals in Advice for All for the Board to employ experienced civil practitioners to provide a legal aid service in areas or subjects where there are concerns over supply should be implemented.**

Simplification of civil legal assistance

In addition to the measures outlined above, the Board has launched a major new project seeking ways to simplify civil legal assistance for applicants, opponents, solicitors and the Board.

Civil legal aid is fairly complex, largely as a result of its governing legislation and regulations, but also because of the nature of the type of work, including assessment of both financial eligibility and the merits of a wide range of types of legal case. Many solicitors do very small volumes of cases: almost half of all outlets undertake 10 or fewer cases a year.

To ensure that it is as straightforward as possible for all concerned, our project will look at all aspects of the system. We believe that this will be an important step in our strategy for building a supportive structure for solicitors providing civil legal assistance, which in turn will help applicants.

Financial eligibility

A review of the system for assessing financial eligibility will be included in the simplification of civil legal assistance project. In addition, proposals to improve financial eligibility were included in the Advice for All consultation, covering **tapered eligibility for civil legal aid, the payment of contributions over an extended period and revising the treatment of benefits between civil advice and assistance and civil legal aid**. The Board strongly supports these changes.

Ministers have recently agreed to our proposals to allow those applicants who are required to pay a financial contribution to their legal aid case a longer repayment period. We shall shortly be implementing this change, which we believe will help a number of applicants to proceed with their case. We await confirmation from the Scottish Executive of what other changes they wish to make and when these can be introduced.

Other methods of advice provision - 'Part V' pilot legal advice projects

Following the success of our first round of projects, running from 2002 to 2005, we have obtained funding from the Scottish Executive to begin the second phase of our innovative legal advice pilot projects, run under Part V of the Legal Aid (Scotland) Act 1986. A total of five projects are now up and running across Scotland.

These projects will enable us to develop and test out new methods of delivering specialist legal advice and improving access to legal services, within rural communities and for traditionally hard to reach client groups.

Five solicitors are employed directly by the Board to work in partnership with local advice giving organisations. The projects are:

- **Fife Rights Forum Project** - providing specialised legal advice and representation to mental health clients in Fife, training to advisors across the Fife Rights Forum Network and to local solicitors, and a secondary advice service to staff working across a range of advice-giving agencies.
- **Argyll and Bute Advice Network Project** - exploring innovative methods of legal advice training and delivery, including video and telephone conferencing, providing support and training for advisors across the Network and handling remote casework for clients.
- **Street Legal Project** (Edinburgh)- providing legal advice to young people and rough sleepers, setting up a 'Virtual Law Centre' focusing on social welfare law by creating a signed up pool of legal practices and advice agencies committed to improving access to services, encouraging appropriate referrals and increasing representation.
- **Citizens Advice Scotland Project** (Inverness)- delivering a second tier advisory service to CABx across the Highlands and Islands through highly tailored training and support for advisors, undertaking direct casework for clients,

and developing referral mechanisms between the CABx and local solicitors.

- **Disability Legal Advice Project** (Lanarkshire) - improving access to legal advice for disabled people by providing second tier support to advisors within CABx and disability organizations, delivering specialist training on disability related legal issues to advisors and local solicitors and direct advice and representation for disabled people.

Criminal Legal Assistance

Criminal legal aid in solemn proceedings

Section 44 of the Bill transfers the responsibility for granting legal aid in solemn proceedings from the court to the Board. The Board supports Ministers' wish to improve consistency and transparency of decision making and achieving greater control over both costs and fraud risks.

We currently receive 80,000 applications for summary criminal legal aid each year. We apply both a merits and means test in these cases and around 80% of these are in our hands for less than 2 days. Very few take more than 5 days.

As we will only be applying a means test in solemn cases, and legal aid is available automatically in most circumstances before the applications is determined, **we do not believe that such a change would result in any delay to the progress of solemn cases or would hamper the defence solicitor's ability to provide professional representation at all stages of the case.**

One relatively minor change in legal aid regulations will be required to ensure that there are no gaps in cover.

Reform of summary criminal legal assistance

The Board has proposed significant changes to the structure of criminal legal assistance in summary cases. As part of these reforms, the current fixed payment arrangement for summary criminal legal aid will be revised.

These changes are closely related to the reform of the summary justice system being taken forward at present through a combination of administrative change and the Criminal Proceedings etc. (Reform) (Scotland) Bill. The Board is working with partners across the criminal justice system to ensure that the legal aid changes are in place to support the wider reforms.

PDSO, Public Defence Solicitors' Office

The Board welcomed the proposal in Advice for All that criminal legal assistance should be provided by a combination of salaried solicitors and those in private practice.

The Public Defence Solicitors' Office (PDSO) currently operates in Edinburgh, Glasgow and Inverness. The Board believes that the PDSO not only offers value for money, but can also help ensure comprehensive access to criminal legal assistance in areas where demand may outstrip supply by private practice.

We support Ministers' view that PDSO should be expanded and look forward to delivering this as and when Ministers decide it is appropriate.

Legal aid facts and figures 2004-2005

Grants of legal aid and advice and assistance

428,821 grants of legal assistance were made in 2004-2005, a reduction of 3% on 2003-2004:

- 139,933 civil legal assistance grants were made, a 7% fall on the previous year. The total includes 10,989 grants for civil legal aid.
- there were 279,306 criminal legal assistance grants, a fall of 1% on the previous year. In this total there were 80,496 grants for summary criminal legal aid and 10,967 grants by the courts for solemn criminal legal aid.
- 9,582 grants were made for children's legal assistance and contempt of court, almost unchanged from the previous year.

Costs to the taxpayer

The total net expenditure on legal aid was £152.4 million, an increase of 4% on 2003-2004:

- £39.9 million was spent on civil cases, 1% lower than the previous year
- £109.0 million was spent on criminal legal assistance, an increase of 6%
- £3.4 million was spent on children's legal assistance and contempt of court.

Payments made for:

- solicitors' fees increased by 4% to £127.3million
- advocates and solicitor advocates fees increased by 5% to £18.8 million
- outlays costs, such as experts, rose by 10% to £17.7 million.

The total cost of running legal aid in 2004-2005 was £11.3 million, a 3% increase.

In 2004-2005, PDSO's running costs were £0.8 million and they dealt with 1,565 cases.

Registered solicitors

Firms of solicitors who undertake legal aid work must be registered with the Board. As at 31 March 2006 there were:

- 736 firms registered to provide civil legal assistance, 2% fewer than 2005
- 625 firms registered to provide criminal legal assistance, 2% lower than 2005.

Annual report and other information

The Board will be publishing its annual report with legal aid statistics for 2005-2006 in the autumn. Our website www.slab.org.uk provides a range of information about legal aid.

The role of the Scottish Legal Aid Board

The Scottish Legal Aid Board was set up in 1987 to manage legal aid in Scotland. We are a non-departmental public body, separate from but responsible to the Scottish Executive. The Board advises Scottish Executive Ministers on legal aid matters, but Ministers are responsible for overall legal aid policy and the Scottish Parliament deals with legislation affecting legal aid, including that setting fees and financial eligibility limits.

Contact details

Publications and reference material that may be helpful to you are available on our website at www.slab.org.uk/reform

If you wish to discuss any aspect of our work, or check any facts and figures, or received printed copies of materials, please contact Colin Sim on direct tel 0131 240 2033 or email simco@slab.org.uk.