

SCOTTISH ASSOCIATION OF LAW CENTRES

Legal Aid Review - Submission

Introduction

Legal Aid is as necessary now as when it was first introduced. Legal rights and benefits can be created, but individuals are not properly protected without advice and representation.

Over time the legal aid system in Scotland has developed and improved with the introduction of Advice and Assistance, the Scottish Legal Aid Board, Advice By Way of Representation and other advances. But changes to legal aid have not occurred in isolation. Scots Law and the Scottish Legal System have also changed dramatically and legal aid has to be seen in the context of those changes. Comprehensive provision of legal advice and representation is a primary and necessary feature, but to be sufficient, the Legal Aid system must do more than this.

This review of legal aid is an opportunity to consider how much further the system needs to go to be sufficient, and what direction it should take.

It is also extremely important to note that any changes can have unintended consequences. It is extremely important that the review should result in an improvement on what has gone before.

General principles and Basic features

A client-led system

Some elements of the system are fundamental and should be enhanced. For example, the legal aid system concentrates on providing legal services for members of the public who need them but may be unable to afford them, and to this extent it is client-led. It is very important that any changes are viewed from this perspective.

Universality

Under the current Legal Aid system, clients are entitled to seek advice on all matters of Scots law. It is important to maintain this universal advice provision. It enables clients with limited means to seek help on any legal issues affecting them and provides for unanticipated problems. There should be no attempt to restrict this universal provision.

Mixed funding

The system currently has a range of methods of funding. By far the largest part of legal aid funds are granted on a case-by-case basis in criminal and family cases. There are however other methods of funding for appropriate activities whether by grants or by directly employing solicitors and others. It is useful to maintain different methods of funding and this allows for flexibility.

Purpose of Legal Aid and Specific Examples

It is less clear that the provision of legal aid in Scotland is intended to promote other progressive social policy objectives. At best it is implicit that the provision of Legal Aid should lead to desirable outcomes, but there is no explicit statement that this should be so.

The purpose of legal aid is not just to provide a legal service in isolated cases, but to work towards achieving other social and economic ends. Clients who need Legal Aid or Advice and Assistance have a specific legal problem which has a wider social or economic context. An individual might

be facing a criminal charge or eviction from their home, and might be unable to afford legal help. But there is a general acceptance that that help should be granted from public funds because we think the innocent should not be convicted and imprisonment only imposed in appropriate cases, or that tenants and homeowners should not become homeless, or that benefit claimants should achieve a certain standard of living and should not be destitute, and workers should not be exploited by unscrupulous employers, and so on.

This approach is central to the work of Law Centres, and is illustrated by our achievements in specific areas of law. Some of the advances made by ourselves along with others have been sufficiently strong to withstand contemporary challenges, but others have not been so resilient.

Most Law Centres depend on grants from local and central government and other sources, but many of our most successful cases have been financed by Legal Aid, and this mix of funding is essential to our flexibility, and our ability to take on those cases which are onerous and time-consuming.

Housing Law

This purposive approach to the provision of legal services is particularly apparent in our housing law cases. Law Centres, working along with counsel, have been instrumental in developing virtually all judicial defender remedies. These have always been supported by legal aid. Law Centres have developed the defence of reasonableness, focused on Minutes for Recall of Decree where this has been tenants' last chance to maintain accommodation, called for pre-action protocols and introduced defences on equalities and human rights grounds.

Homelessness law originally benefited from the input of a small number of legal aid private firms as well as the very high volume of work by three or four Law Centres, and this has all been supported by legal aid.

In many cases there will be a conflict between different policy objectives resulting in conflicts which can only be resolved by court action. For example, Housing Associations provide and maintain high quality accommodation, and they may need to control rent arrears. Where this results in an increasing desire to remove certain tenants, judicial control is required to prevent unreasonable and unlawful consequences. Tenants facing these problems are often vulnerable or

poor, and intervention is required at an individual level in order to protect tenants through the court system.

Another example results from the transfer of rented housing stock from City of Glasgow Council to the Glasgow Housing Association. This process has now resulted in there being almost 100 social sector housing providers in Glasgow. This and other factors have made the administration of homelessness protections extremely difficult. It is extremely important that individuals affected have recourse to the legal system in order to enforce their legal rights.

The continuing availability of Legal Aid is essential to allow access to justice in these crucial areas, and to facilitate appropriate legal development.

Social Security

Social security law and practice has become particularly problematic over the past few years, with substantially higher levels of destitution and increased use of foodbanks. The causes for this are not complicated. Dozens of reports have been produced by many different types of organisation from large charities such as the Child Poverty Action Group to small foodbanks themselves.

The reasons cited for increased foodbank use all point to problems with state benefits with only the proportion varying. Some research indicates that as little as 40% of foodbank users have benefit problems, while other findings put the proportion at 70%. The failure of the benefit system is however invariably mentioned as an important contributory factor.

Clearly there are a number of ways of challenging these difficulties. One of the most effective, certainly for individual claimants, is advice involving negotiation with the relevant government agency, usually the Department of Work and Pensions, and representation at benefit tribunals.

State benefits are one of the most complicated areas of law and it is extremely important that funding is available to allow the participation of solicitors. Social security problems are so widespread that a host of advisers have been providing essential advice services for many years. But the link between lay advisers and the legal profession is less robust. This has resulted in fewer appeals from First Tier Social Security Tribunals in Scotland than might have been expected. There is also substantial disparity between different geographical areas of Scotland. It is important to

develop the relationship between legally qualified representatives such as solicitors and non-legally qualified advisors. Similarly, while there are a significant number of appeals and judicial reviews in England on social security issues, the same is not true of Scotland and consideration needs to be given as to how this can be remedied.

At present in Scotland disabled people and those who are least well-off are losing out due to a failure to identify specific legal issues within very substantial caseloads which might be conducive to appeal and judicial review. The Scottish Legal Aid Board should develop in order to address issues of this nature.

Employment Law

It is hardly a coincidence that the numbers of Employment Tribunals have plummeted at the same time as there has been an increase in in-work poverty.

Recent developments in employment law have resulted in substantial problems for employees, especially those facing legal and other difficulties in the course of their employment.

There are some obvious procedural and substantive changes which would alleviate this. For example, the abolition of employment tribunal fees would help a great deal. Also, there has been no attempt to address the changing nature of employment, and a substantial further extension of statutory rights and protections which go beyond the employer:employee relationship to cover all types of workers would be a great improvement.

Recent changes in legal aid have also contributed to the reduction in legal representation at Employment Tribunals. Advice By Way of Representation was a positive improvement, but the extension of the clawback to employment cases, whereby legal fees are paid from employment tribunal awards, was extremely retrograde. Many employment tribunal awards amount to only a few thousand pounds, and the application of the clawback can result in the client receiving little or nothing. This in itself is a major disincentive to solicitors participating in employment law casework, with little or no financial benefit to the state.

These developments have all taken place at the same time as employment law has become extremely complicated, not least in relation to equalities and anti-discrimination legislation. Employment tribunals often involve exceedingly complicated legal issues and procedure.

At this time legal representation at employment tribunals should be increasing rather than decreasing.

Mental Health & Disability

Law Centres have also witnessed a growing epidemic of anxiety and mental ill health, and the need for all decision-makers to consider all persons with protected characteristics under equalities legislation. Withdrawal of community care services and disputes regarding access to social work resources are also areas of major contention.

These are examples of areas of law where skilled advice and representation is essential. Advice on its own is not enough. Clients concerned are unable to assert their rights themselves. Law Centres have been instrumental in developing remedies in these areas and focusing on providing legal representation

Legal Aid and other types of funding

Funding issues are extremely important and affect Law Centres as much as any other type of legal firm. Law Centres are generally based on a mixed model of funding. Very few Law Centres have ever been solely dependent on one form of funding only. Law Centres often obtain grant support from local authorities, from Trusts and have contracts with local and central government. At times one or two of these grants provides core, sustainable, long term funding.

On the other hand, in order to function in a number of areas of law, legal aid provision is essential. At the very least it is necessary in order to meet the costs of outlays such as medical reports. Often legal aid funding on a case by case basis enables a whole area of casework to be undertaken, or helps in taking on test cases.

Different Law Centres have different casework profiles. Some Law Centres have whole departments which are entirely dependent on legal aid, while other Law Centres have minimal legal aid income. In all cases, it should be noted that legal aid income provides additionality and Law Centres are committed to avoiding double funding.

In principle, Law Centres are committed to the idea of a legal aid system that is viable financially. That is to say, one which funds key areas of legal remedies sufficiently, so that the provision of these services does not need to be dependent in whole or in part on grants. This is, broadly speaking, the only mechanism which allows for political independence, and this is extremely important.

In general, the Law Centre experience is that Advice and Assistance is flexible and produces resources speedily. Financial verification can however cause problems. The Scottish Association of Law Centres proposes that financial verification processes should be reduced sharply and, at least in key strategic areas, there should be a procedure for applying for enhanced hourly rates for Advice and Assistance.

It is also very important to note that the rate of pay for Advice and Assistance is well below the real cost of service provision. This makes it very difficult for solicitors in Law Centres and conventional firms to provide legal services. At the very least, the hourly rate for Advice and Assistance and other forms of legal aid should increase in line with inflation. Without this, a career in legal aid is unattractive for all but the most committed. These problems have only worsened in recent years. The disparity between fee levels in commercial work and legally-aided work has increased exponentially and this problem must be addressed.

The application process for Advice and Assistance and Legal Aid is complex and recent increased demands for financial verification have simply added to these problems. The whole process is very difficult to manage and when this is combined with stagnant income the prospects for long term sustainability are at the very least questionable.

Law Centres and the community

Fundamentally, Law Centres, working for local communities, or for communities of interest, are also under user control, and are an extremely positive way of providing legal services. Law Centres are committed to the concept that clients and those from local community groups have control over the resources available for the provision of legal advice and representation.

The availability of Legal Aid and Advice and Assistance for Law Centres enhances this function as decision-making is not mediated by a grant-giving body, supportive though grant-givers always are.

Further, it is extremely important that potential clients have direct access to legal representation and not just lay advice or representation. Gate-keeping by non-lawyers is completely unnecessary and often results in clients being referred to inappropriate advisers. This is extremely counter-productive and often results in avoidable difficulty.

Partnerships between different types of organisations can be productive, but embedding legal practitioners within non-legal agencies creates an imbalance which can lead to outcomes which are at best ineffective and at worst a complete failure.

Ideally clients should exercise an informed choice as to the type of help they need, and obtain legal representation where that is appropriate.

Summary

Changes resulting from this review should be progressive, building on existing principles and values. The Legal Aid system should continue to be client-led and encompass all areas of law.

Mixed funding should be maintained with development of different types of funding determined by a consideration of desired outcomes.

Any change should be informed by past successes, with an awareness that different problems exist in different areas of law. Some areas might require an increase in the number of legal practitioners,

some may require better co-ordination between legal and non-legal advisers, and some may require a change in Legal Aid financial rules.

Any changes in Legal Aid should be consistent with overall social policy objectives. For example, a recognition of deficiencies in the social security system should result in expansion of legal help in this area.

The Board should develop a greater strategic role in managing these developments.

Legal Aid rates should increase – in line with inflation at least.

Scottish Association of Law Centres

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