



lawyers for  
children & young people

## CLAN CHIDLAW

### INDEPENDENT STRATEGIC REVIEW OF LEGAL AID

#### CALL FOR EVIDENCE

1. Clan Childlaw welcomes the opportunity to consider and respond to the Independent Review of Legal Aid's call for evidence to the independent strategic review of legal aid. The evidence we put forward for consideration is derived from our experience as providers of legal aid services in Scotland, and from what we have learned from delivering innovative services to a client group with unmet legal needs who encounter specific obstacles to securing access to justice. Our work with children (up to the age of 18) and young people (up to the age of 21) gives us a valuable insight into what they require - and more generally what an under-served, complex-needs client group requires - from the legal aid system to enable them to access the legal advice and representation that they need.
2. We believe that the law should comprehensively protect and strengthen the rights of children and young people under the United Nations Convention on the Rights of the Child, including their right to legal advice, assistance and representation by a solicitor, funded by legal aid.

*ARTICLE 12 UNCRC: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

3. Our approach has been to answer one of the principal questions under consideration. Answering the question: **“if you were designing a system of legal aid today what would you do differently from the current system to make it more effective and person centred?”** has led us to identify a

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number of relevant issues in relation to legal aid for children and young people in Scotland which we would like to see addressed by the independent strategic review of legal aid.

4. Access to justice for a child or young person facing legal decision making processes that will impact on their safety, welfare and life chances means access to the same protections and benefits as an adult, which is representation by their own solicitor. In exactly the same way as an adult, to ensure that their rights are protected and realised throughout the entire legal process affecting or involving them children and young people must have their rights and all their options fully explained by a legal professional so that they are empowered to give a view informed by understanding of their rights and the law as it affects them. To give them the best chance to instruct a solicitor and engage with them to get a positive outcome, children and young people must have access to child centred legal services and legal aid services. We consider that to secure access to justice for children and young people in Scotland, Scotland must have a child and young person centred legal aid system.

### **About Clan Childlaw**

5. Community Law Advice Network (Clan Childlaw) is a charity which aims to improve children and young people's life chances by using our legal skills and expert knowledge to help young people take part in decisions that affect them, and by making sure that children's rights are realised in Scots Law.
6. Clan Childlaw Limited is an independent law centre providing free, child-centred legal representation exclusively to children and young people. We provide an innovative, child-centred legal outreach service developed to meet the specific advice seeking needs of children and young people. This gives practical effect to Article 12 of the United Nations Convention on the Rights of the Child, enabling children to participate in decision-making processes which affect them, and supporting and empowering them to take an active role in improving their life chances.
7. Clan Childlaw provides learning and development opportunities across Scotland for lawyers, practitioners and professionals working with children and young people, to raise awareness of children's rights and how the law can help children and young people. We maintain

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networks and partnerships across children's rights and support organisations and the legal profession, in order to promote the use of law and human rights amongst the voluntary sector. We undertake a variety of policy work to promote the legal rights of children and young people. This includes policy work around access to justice and Children's Legal Aid. Clan Childlaw's Principal Solicitor has been appointed to the Scottish Legal Aid Board's Children's Quality Assurance Committee.

8. Approximately 71% of the young people we assist receive some legal aid funding for their case. 80 % of our legal aid work is under Children's A&A (including ABWOR), Automatic Children's A&A and Children's Legal Aid. 20% is Civil Legal Aid and Advice and Assistance.<sup>1</sup>
9. Our representation work provides access to justice for children and young people in relation to children's hearings and all matters of child and family law, and in relation to civil legal problems for children in care and care leavers, as well as social welfare law problems which young people can encounter. Statistical evidence supports the view that young people are disproportionately affected by social welfare problems such as homelessness and mental ill health<sup>2</sup>. Legal aid services which facilitate early interventions in legal problems faced by children and young people can help prevent future, long term problems and may avoid life-long difficulties for the adults they become. Legal aid undoubtedly plays a vital role in ensuring legal representation for children and young people and so in reducing inequalities, upholding social justice and improving lives for children and young people.

## **Ethos Of Legal Aid Services**

*Access to justice is essential for the protection of the rights of children. It is especially important for protection from discrimination, violence, abuse and exploitation, and for ensuring their best interests in all actions involving or having an impact on them...".<sup>3</sup>*

10. We believe that any child or young person with capacity to instruct a solicitor who seeks to enforce their statutory rights, or who stands to be

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<sup>1</sup> Clan Childlaw data

<sup>2</sup> James Kenrick, The outcomes & impact of youth advice – the evidence: key research evidence on the difference made to young people's lives by social welfare advice services, Youth Access, 2011, available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue).

<sup>3</sup> (J Beqiraj and L McNamara, Children and Access to Justice: National Practices, International Challenges (Bingham Centre for the Rule of Law Report 02/2016), International Bar Association, October 2016,

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impacted by any legal decision-making process, should be able to access the benefits, protections and assurances of independent legal advice, assistance and representation for themselves, in the same way that an adult can. This must include a legal aid system which meets the needs of children and young people as applicants and so allows them to access legal aid on the same terms and an equal basis to adult applicants.

11. Clan Childlaw considers that the ethos which should underpin legal aid services, and be embedded in the delivery of legal aid services in the future, is the principle that legal aid must fund everyone, including every child with capacity and every young person, so that they have equal opportunity to be legally represented in any judicial and administrative proceedings affecting them.

*Rights mean nothing without the knowledge and means to enforce them... Access to good quality information, advice, advocacy and representation is crucial if we are to understand our rights and responsibilities, deal with difficult problems in our lives and navigate our way to becoming confident and independent adults... <sup>4</sup>*

12. When a child or young person is involved in a legal process or judicial and administrative proceedings, then legal aid must be fully and unequivocally available to them to fund an independent specialist solicitor to protect their position and safeguard their rights, give them equality of arms, and allow them effective access to a fair hearing or legal remedy.
13. We know from experience that advice, support and advocacy workers can play a vital role in enabling children and young people to express their views and access advice on their rights. We support the expansion of regulated, independent advocacy services and the consistent availability of high quality advocacy workers to help children and young people express their views and be heard. However, we do not consider expansion of advocacy or advice services alone to be an alternative method of resolving legal problems for children and young people. There must not be a two-tier system where, in situations where an adult would be funded to have their own lawyer, children are considered to be adequately served by advice from and

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<sup>4</sup> (Make Our Rights Reality Manifesto, Justrights)

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representation by unqualified, unregulated advocacy, advice or support workers.

## Legal Aid and Children's Rights

14. The European Court of Human Rights has found that the right of access to a court contained in Article 6 of the Convention encompasses the right to free legal assistance in civil matters of indigent applicants when such assistance proved indispensable for effective access to the courts and a fair hearing, in particular for ensuring the equality of arms. In deciding whether the free legal assistance is indispensable for effective access to the courts or fair hearing in a particular case, the Court will consider the particular facts and circumstances of each case, taking into account several factors: (1) the importance of what is at stake for the applicant; (2) the complexity of the case or the procedure, particularly when legal representation is mandatory by law; (3) the capacity of the applicant to effectively exercise his or her right of access to court.<sup>5</sup>
15. Clan Childlaw would submit that in the vast majority of legal proceedings or decisions involving a child or young person the importance of what is at stake for the applicant is very high. Children's hearings and court cases usually deal with issues around children's safety, welfare and wellbeing and determine where a child is to live, their family relationships, their support to access opportunity etc. We would further submit that for a child or young person, the case or procedure will always be complex; and a child or young person, no matter how articulate or informed, has restricted capacity to effectively exercise their right of access to court.
16. Although we are reassured to note that the review is undertaken in a stated context of maintaining access to public funding for legal advice and representation, it is not possible to submit a view on legal aid without addressing the impact on children and young people of the cuts to legal aid in England made by the 2012 Legal Aid, Sentencing and Punishment of Offenders Act.
17. The United Nations Committee on the Rights of the Child's concerns are documented in their Concluding Observations:

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<sup>5</sup> Airey v. Ireland, Judgment of October 9, 1979

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*The reforms concerning the reduction of legal aid in all four jurisdictions appear to have a negative impact on the right of children to be heard in judicial and administrative proceedings affecting them<sup>6</sup>*

18. A report by Amnesty International states that:

*..the cuts to legal aid have had far-reaching and negative implications for children and vulnerable young people whose capacity is restricted, their right to be heard and to have their best interests protected. Children and vulnerable young people cannot be expected to navigate complex legal processes alone, yet that is precisely what LASPO allows for. The impact has also been felt in cases where the best interests of the child are very much at stake, including in private family law cases. If parents or carers cannot access legal advice, assistance or representation, it can negatively impact the ability of decision-makers, administrative and judicial, to make decisions properly.<sup>7</sup>*

19. We agree with Amnesty International's conclusion that, to ensure the right of the most disadvantaged sectors of society to access justice is adequately protected, steps must be taken to reform legal aid provision "to ensure that children and young people have an entitlement to legal aid, regardless of the legal issue at stake"; and "that children and families without sufficient means should be able to obtain legal advice, assistance, and where litigation is contemplated, legal representation free of charge in any case where a child's best interests are engaged."<sup>8</sup>

8

## **Child and Person Centred Legal Aid Services**

20. A child and young person centred legal aid system needs to support legal aid services that are targeted at young people's specific needs and facilitate child and young person centred legal services.

21. In our experience, an effective child and young person centred legal service will have the following characteristics in order to make it accessible to children and young people:

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<sup>6</sup> Committee on the Rights of the Child Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland \* June 2016 para 29

<sup>7</sup> CUTS THAT HURT - The impact of legal aid cuts in England on access to justice – Amnesty International - October 2016

<sup>8</sup> CUTS THAT HURT - The impact of legal aid cuts in England on access to justice – Amnesty International - October 2016

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22. It will be **child-friendly** and will not expect a child to use and comprehend a system designed for use by adults.
23. It will be **confidential** and **independent**, respecting the child's autonomy – it will not make the award of legal aid for a child contingent on an adult's consent or on an adult's ability or willingness to provide information or pay a contribution. It will be possible for a child to get advice under legal aid without the adults who support them knowing that they have sought advice and help.
24. It will be **equal**, treating legal proceedings affecting children and young people as equal and fully equivalent to legal proceedings affecting adults. It will not be a second tier or restricted service.
25. It will be **child-centered** and will provide access to a solicitor who works in a child centred way to every child who needs legal advice, assistance or representation. It will reimburse solicitors for the costs of working in a child centred way which enables the child to access legal services and stay engaged with them.
26. Any **alternative methods of resolving legal problems for children and young people will be child centred**. Children and young people will have access to consistently available, regulated, child centered advice and advocacy services but the system will not expect a child to use an unqualified advisor or representative as an alternative to instructing a solicitor where that is what is required to fully protect and enforce their rights.

## CHILD FRIENDLY

### Reasons the Current System is not Child-Friendly

27. The current system expects children and young people to use and understand forms and guidance and a complex system designed for use by adults. The system has not been adapted or adjusted to make it usable or suitable for children and young people. As a consequence, the legal aid system is currently extremely difficult for young people to use and understand, even with a solicitor to explain. The complexities and barriers to legal aid deter children and young people from contacting solicitors, and those working with children and young people from referring them to legal aid solicitors. As a direct consequence of being required to understand and use an adult

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system, some children and young people are prevented from accessing legal aid services and do not get access to justice.

28. As a snapshot illustration of the various ways in which the current legal aid system is not child –friendly and is an attempt to apply an adult system which is not fit for purpose regarding child applicants, we would suggest that the Review considers the Scottish Legal Aid Board's leaflets intended to explain Children's Legal Assistance to children and young people. The leaflets are not easy to read or child friendly. They expect the child to know what type of children's hearing has been called and what stage of the process their case has reached and what type of assistance they are being given.
29. The current system expects a young person to comprehend and distinguish between four overlapping but different types of legal aid in relation to children's hearings: Automatic; Children's Advice and Assistance; Children's Legal Aid and ABWOR. Each type is applicable in relation to distinct types of advice, assistance or representation and/or different types of children's hearing at different points in proceedings. There are further complexities when, as is not uncommon, a child or young person also requires civil or criminal legal aid.
30. There are different tests for each different type of children's legal aid, including financial tests assessing the child's income, savings and "any items of value you own", even where it is self-evident that the young person is not financially independent.
31. Many young people and children who require legal aid services are in crisis or have been and are leading chaotic lives. Many have been disadvantaged and/or have had their lives significantly disrupted. It discriminates against this group to make legal aid unavailable on the basis they are unable to provide documentation or verification or pay a contribution, however small.
32. In some situations a parent's financial circumstances may be taken into account and that assessment and their willingness to pay a contribution may rule the child out of receiving legal aid. Many children are in contention with those who have a duty to financially support them. Some are not safe with those who financially support them or their families. Many will not seek legal advice under legal aid if that means having to disclose to their parent or care giver that they have done so. It discriminates against this group to expect them to disclose to family or

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care providers that they are seeking legal advice, and to make a child rely on adult family members or authority figures to provide information or corroboration in order to get legal assistance.

33. There is – in some circumstances but not all - a requirement to demonstrate that the child cannot effectively participate in proceedings without legal representation. This applies the same test which assesses the eligibility for legal aid of adults who are relevant persons to a child, although a child has different standing to a relevant person in the hearing process. The effective participation test is a spurious and irrelevant test for a child who is the subject of a children's hearing. We would suggest that where an adult who is a relevant person may be able to effectively participate in a children's hearing without representation, a child never can. A children's hearing is a complex legal decision making process, which is invariably highly emotional in nature and has at stake that child's safety, wellbeing and life chances. It is therefore always the case that a child cannot effectively participate without representation. This irrelevant effective participation test is indiscriminately applied to children in the current system when it is self-evident that a child involved in a legal process cannot effectively participate and represent themselves.
34. Legal aid applications for children involved in the children's hearing process ask the solicitor to demonstrate that there is a legal issue before legal aid will be granted. This test applies a wholesale presumption that Children's Hearings are not equivalent legal decision-making bodies and that their decisions have less legal status than legal decisions about and affecting adults. A Children's Hearing is a legal decision-making process making legal decisions and orders, which involve multiple statutory and human rights issues, and the outcome of which will have a significant impact on the child's life. It is self-evident that there is a legal issue for the child. An adult faced with a legal decision-making process making legal orders, although they might be asked to explain the complexity to justify why this requires legal advice and representation, would not have to overcome a presumption that this is not a legal issue.
35. The requirements and tests above mean that the current system discriminates against children by treating them as adults are treated, with no regard to or adjustment or allowance for the difference in their needs and circumstances. There is further discrimination in not recognising Children's Hearings as legal decision-making bodies of

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equal importance and equivalent standing to a legal decision-making body for adults.

### **What would a child-friendly civil legal aid system look like?**

36. A child friendly legal aid system would be based on an assumption that children and young people (under 18) have an entitlement to legal aid, regardless of the legal issue at stake and would have the following characteristics:

- a) One type of civil legal aid for all children and young people up to the age of 18.
- b) One straightforward form that can be fully understood by children and young people, requiring one signature which constitutes all the authorisations and permissions required
- c) A one page leaflet provided to all applicants explaining their entitlement to legal aid in easy to read language that a child can understand.
- d) No financial assessment where the child or young person is: looked after; a care leaver funded by a local authority; provided for by their parents; in full time education or in receipt of income benefits. The applicant's signature on the application providing authorisation for the Board to seek verification of those circumstances direct from the relevant bodies.
- e) There should be no contributions for under 18s unless they are financially independent.
- f) Where an applicant is financially independent and under 18 they should be directed to free support to assist them with obtaining and providing verification and other documentation, or legal aid should be paid for the firm's time spent gathering this information. Applicants under 18 should be given extended time and multiple opportunities to provide verification or alternatives.
- g) Remove the effective participation and merits test. The test should be that the applicant is under 18; and that there is a case where the child's best interests are engaged.

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- h) Legal aid should reimburse lawyers for the cost of travel to an initial 'free' meeting with a child or young person in a place of their choosing, for the purpose of ensuring the child understands their entitlement to legal aid and the legal aid process, for assessment of capacity and eligibility and to explain what it means to instruct a solicitor.
- i) A child applicant is awarded eligibility for legal aid and can then instruct their solicitor to demonstrate to the Board what legal advice, assistance and representation is required at each stage and for each legal problem that arises, without new or multiple applications being required. An applicant can get holistic legal advice on a number of child law and social welfare issues, and can go to a specialist if required e.g. in asylum or immigration without making a separate civil legal aid application.
- j) There are dedicated staff at Scottish Legal Aid Board who deal with all civil applications made for legal aid for a child or young person and who are familiar with child law, and children's hearings and child law court process and children's rights.
- k) To inform making the system more accessible for children and young people, the Scottish Legal Aid Board gather data on the number of children who need legal aid but who do not make or do not complete an application and the reasons for that, as well as any reasons why legal aid is refused.

## **CHILD-CENTRED**

### **What does working in a Child Centred Way mean?**

37. Clan Childlaw are committed to always working with children and young people in a child and person centred way because providing outreach services and working in a child centred way gives children and young people the best chance of accessing and engaging to get legal advice and representation.

38. The child or young person will always meet with a specialist solicitor, who specialises in working with children and young people. We meet with them at a time and place they choose which is familiar to them, comfortable for them and is a stress free setting (i.e. not immediately prior to or after court or a children's hearing). We call this 'outreach' but our outreach service goes far beyond the standard outreach service –

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which might be at a drop in or surgery in the community. In our experience requiring attendance at a fixed time and place will mean that children and young people can't or don't engage with services. For this reason, our outreach service only requires that the child or young person identifies that they want to meet a solicitor and a place and time that suits them, then we come to them. This means that our clients can access our services initially and that they can work with us consistently through their case and we rarely have to withdraw from acting. Our advice is always free to the child. We meet with children and young people as often as they need and give them as much time as they need to talk through their problems. We aim to build a relationship of trust with the young person and to have them always work with the same solicitor.

39. The child-centred approach works and obtains good outcomes for children and young people. We evaluate our service against the Scottish Government's Getting It Right For Every Child Well-Being Indicators. When we last evaluated our services: 100% of our clients said they felt safer knowing that they could contact their solicitor about any problem. <sup>9</sup>After they had worked with us for a time 100% of our clients felt less worried about their problems and said that having a child centred solicitor made them feel supported in achieving what they wanted and that they understood more clearly what was happening to them, as well as the choices that they had. After working with a solicitor 95% of our clients said they felt that they were doing something about their issues. 90% of our clients felt more confident in expressing their views, and taking part in decision-making because they had a child centred solicitor. 95% of our clients said that the help they had received from their solicitor made them feel more confident about asking for help and felt more included in what was happening. That is there is evidence from the operation of our services that the child centred approach is effective in achieving outcomes for children and young people and in building their confidence, resilience and willingness to engage and take responsibility for resolving their problems.

### **Child-Centred Working and Legal Aid**

40. As stated above, approximately 71% of the young people we assist receive some legal aid funding for their case. 80 % of our legal aid work is under Children's A&A (including ABWOR), Automatic Children's A&A

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<sup>9</sup> Clan Childlaw data

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and Children's Legal Aid. 20% is Civil Legal Aid and Advice and Assistance.

41. The work that we do in order to work in a child centred way is pro bono – for example our outreach work involves travel to an initial meeting with a child, text messages and time taken to communicate with the child and those supporting them to arrange meetings and multiple meetings to support relationship building – there are also costs and follow up informally on progress, or informally repeating or clarifying things for the child so they are reassured and fully understand what is happening with their case. Although working in this way is essential in getting the applicant to engage with resolving the matter, Legal Aid does not fund solicitors travelling to meet clients or having multiple or lengthy interactions with clients where these are not demonstrably and directly necessary for progress or resolution of the case.
42. We work on a number of cases without applying for legal aid, because legal aid is not available or because claiming would be detrimental to the child's interests e.g. court ordered contact cases where we cannot ask parents for financial details or a contribution because the child expresses reservations although they may not be sufficient to constitute an exemption, or where there would have to be unacceptable compromise on the child's confidentiality or the independence of the advice and representation.

### **Reasons the Current System is not Child-Centred**

43. Legal Aid information leaflets make frequent reference to the child or young person having a lawyer to explain the system to them but they do not explain what a lawyer is or how to find one or pay for one. They refer children and young people to a 'find a solicitor' function on a website which is unlikely to be accessible to children or most young people. Although digital access to the application process and information about legal aid should be available, many young people do not have unrestricted or safe access, or do not have access at all. The leaflets and sources of information also direct to general phone lines and advice services, which cannot provide a child with a solicitor or free representation under legal aid. Evidence from analysis of legal aid case data indicates that the case outcomes achieved for clients via telephone advice are significantly inferior to those from face to face

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advice and young people consistently identify that their preferred means of getting information and advice is face to face.<sup>10</sup>

44. The current system does not consistently provide every child with access to a solicitor who works in a child centred way. We refer children and young people to local solicitors who practice child law under legal aid, but these may not be solicitors who are able to work in a child or person centred way or provide outreach services under legal aid, and this may mean that a young person cannot access the legal service they need or cannot maintain instructions.

### **What Would a Child-Centred Civil Legal Aid System Look Like?**

45. A Child-Centred Civil Legal Aid System would fund solicitors to work as a trusted advisor “operating within a non-bureaucratic system that recognizes the value of building relationships of trust and enables the adviser to deal with clients as people not cases”<sup>11</sup>, and put measures in place to ensure that solicitors were delivering child centred services.
46. A child centred legal aid service must recognise that children and young people as a group face a much wider set of obstacles that make it more difficult for them to access justice, beginning before they seek advice from a solicitor.

*Restoration of legal aid to children and young people should therefore be viewed as a necessary, but not sufficient, measure to ensure access to justice for this group of vulnerable people. For example, more effective public legal education is required to raise young people’s awareness of their rights and responsibilities; to build their life skills and resilience; and to help young people avoid problems and cope with them when they do arise<sup>12</sup>.*

47. A child friendly legal aid system would be based on an assumption that children and young people (under 18) have an entitlement to legal aid funding for child-centred legal services and would have the following characteristics:

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<sup>10</sup> Youth Access, “More of the same? The Advice needs of young people, January 2016; available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue)

<sup>11</sup> Youth Access, “More of the same? The Advice needs of young people, January 2016; available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue)

<sup>12</sup> CUTS THAT HURT - The impact of legal aid cuts in England on access to justice – Amnesty International - October 2016

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- a) As soon as any question of what the child's view is or what is in their best interests is raised, the child receives child-friendly information about getting a lawyer. This information can be provided by independent and confidential bodies such as Scottish Children's Reporter Administration, Scottish Court Service, schools, Throughcare Aftercare services, and independent advocacy services.
- b) A child with a legal issue who wants to find out about getting their own lawyer, can use a free confidential method of contact and, through one interaction, can arrange a face to face meeting with a child centred solicitor.
- c) All solicitors who seek to deliver children's legal aid and legal aid services to children and young people (not just children's hearings) are registered.
- d) All solicitors who are registered to deliver children's legal aid and civil legal aid services to children would have travel and time funded by legal aid where they demonstrate the work was related to giving child centred advice and assistance.
- e) All solicitors on the register would be assessed annually to ensure that they were providing services in a child centred way – e.g. child centred outreach services, services free to the child, relationship building and communication appropriate to the child needs. They would always arrange to travel to a free initial meeting with the child.
- f) All solicitors on the register would – where they had availability and capacity - accept referrals from advice, support and advocacy services working with children and young people in their local area and from other solicitors.
- g) All solicitors on the register would have to undertake compulsory CPD on communication with children and young people, children and young peoples' advice seeking needs and child centred working, as well as the relevant areas of law.
- h) Solicitors registered would become members of a Scotland-wide network of child centred solicitors and agencies committed to cross referring and working together on development and training and information sharing, best practice and strategic litigation.
- i) Solicitors registered would commit to cross refer with a range of local services that could assist with non-legal support and advice needs to

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resolve children and young people's social welfare problems aiming to ensure that young people they are assisting are able to access information, advice, counselling and support on all the issues they need help with, without having to go through the advice seeking process multiple times. The work involved in making referrals, signposting and arranging support would be funded under legal aid where it can be demonstrated that additional support and help on non-legal issues is required to fully resolve problems underlying the legal issue e.g. a young person facing eviction for rent arrears requires a legal intervention to defend eviction proceedings but also requires debt and benefit advice and support with claiming and budgeting and managing their tenancy.

- j) There is a duty scheme for all court cases involving children and young people and all children's hearings. Children and young people are allocated a solicitor who will work in a child centred way. The only circumstances where a child or young person is not advised and represented by a solicitor is where they have opted out of legal help.

## **ALTERNATIVE METHODS OF RESOLVING LEGAL PROBLEMS FOR CHILDREN AND YOUNG PEOPLE**

48. Clan Childlaw have effective key partnerships with a number of organisations across the third and public sectors, most of whom regularly refer children and young people to us for legal advice and representation. We provide free services to third and public sector organisations – training; information and “second tier advice” –all aimed at increasing advocacy, support and advice workers knowledge of children's rights and the law affecting children and young people. This means that they can inform the children and young people they work with about their rights and entitlements, help them have their views heard, and identify when they have a problem that requires a legal intervention. We also provide help with finding local or specialist child law legal aid solicitors or advocacy and appropriate specialist agencies when the child or young person is outwith the geographical area that we cover. None of this work to expand access to alternative methods of resolving legal problems for children and young people is funded by legal aid. We receive funding from the Scottish Government, local government and other funders which contributes to meet the costs.

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49. We consider that there is scope for advocacy, support and advice services to work together effectively with legal services to facilitate early intervention and resolution of legal issues for children and young people. It is essential to recognise that there is substantial evidence that children and young people will not engage and achieve good outcomes if they are required to attend generalist adult services.<sup>13</sup> It must also be recognised that although there are situations where a child centred advice worker or advocacy worker can do all that is required to achieve a good outcome for a child, where there is a need to protect their position and safeguard their rights and guarantee their entitlements, the child must have their own independent lawyer and legal advice.

### **Article 6 of the European Convention on Human Rights (ECHR) and Alternative Methods of Resolution/Lay Representation in Child Law cases**

50. It is already recognised that legal representation should be available for hearings relating to the deprivation of liberty, such as those required by Article 5 (4) of the ECHR. We submit that other types of hearing for children and young people should also be covered by “Automatic” legal aid - for example, where the grounds for a children’s hearing are that the child has committed an offence or where the supporting facts contain or refer to offending behaviour a child should have legal advice and representation because any disposal may in future be treated as a prior charge in a way which impacts on their ability to use a criminal defence or secure employment as an adult.<sup>14</sup>

51. To be Article 6 compliant a legal aid system has to ensure access to the court through legal aid or in some other way<sup>15</sup>. There is case law (see below) to suggest that free legal assistance may be necessary in civil matters to ensure that access to a court is both effective and fair. Each side must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage.

52. A violation of Article 6 has been found where the Court concluded the case would have been conducted differently had the claimant been given effective counsel instead of representing themselves. Assistance

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<sup>13</sup> Youth Access, “More of the same? The Advice needs of young people, January 2016; available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue)

<sup>14</sup> AB v HMA [2017] UKSC 25 and P(AP) v Scottish Ministers [2017] CSOH 33

<sup>15</sup> PUBLIC INTEREST LAW INSTITUTE paper European Court of Human Rights Jurisprudence on the Right to Legal Aid

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afforded to the claimant by the counsel for the other parties, and the latitude the judge granted her in presenting the case were considered no substitute for competent representation by a lawyer. In that case it was suggested that the complexity of the case, the importance of what was at stake, and the highly emotional nature of the subject matter were relevant factors<sup>16</sup>.

53. In another case<sup>17</sup> the Court held that the applicant had not had effective access to a tribunal, in breach of Article 6 (1) of the Convention because the possibility of conducting his own case in proceedings against a legal practitioner had not afforded the applicant the right of access to a court in conditions allowing him the effective enjoyment of equality of arms, a principle inherent in the concept of a fair hearing.

54. In another case<sup>18</sup> the Court found a violation of Article 6 (1) and reiterated that it is central to the concept of a fair trial, in civil as well as in criminal proceedings, that a litigant should not be denied the opportunity to present his or her case effectively before the court, and that he or she should enjoy equality of arms with the opposing side. The court further considered that neither sporadic help given by volunteer lawyers nor extensive judicial assistance and latitude granted by judges to the applicants was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law, especially given the disparity between the levels of legal assistance enjoyed by the applicants and their opponents.

55. We would submit that in Children's Hearings, child law and family law cases where a young person is a party, the use of alternatives such as lay representation or representation by an advocacy worker, is not viable. Due to the complexity of proceedings and the child's standing, the importance of what is at stake, and (as a general rule) highly emotional nature of the subject matter, an unqualified lay representative or advocacy worker cannot be a substitute for competent and sustained representation by an independent, experienced child and family lawyer. This is particularly the case where the other parties, notably the local authority and SCRA and in some

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<sup>16</sup> Airey v. Ireland, Judgment of October 9, 1979

<sup>17</sup> Bertuzzi v. France, Judgment of February 13, 2003

<sup>18</sup> Steel and Morris v. United Kingdom, Judgment of February 15, 2005

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circumstances family members whose views the child disputes will have representation by qualified solicitors.

## **Advocacy Services for Children and Young People**

56. Clan Childlaw works effectively with a number of excellent advocacy and support services and we have noted the benefits when young people have access to dedicated advocacy services. An advocacy worker is someone who assists and supports a child in formulating and expressing their view in situations where they may need assistance and support to do so. An advocacy worker is not legally qualified and, although they will have more knowledge of children's rights and the hearing or court process than the child, they are unlikely to have any applicable knowledge of the relevant statute, regulations, case law, court rules or legal process. An advocacy workers skills are in working in a child centered way, communicating with a child and making sure the decision maker hears the child's view. They can form a trusted relationship with a child and help them identify how to resolve the different problems they have and link them to relevant supports and gather information for them. They do not have legal knowledge or legal skills in framing legal arguments, negotiation, mediation or representation. A child or young person whose view is given with the assistance of an advocacy worker is not legally represented or advised and is effectively being supported in order to represent themselves. They do not have equality of arms with a person or organisation that is legally represented.
57. Although broadly supportive of the expansion of advocacy services to children and young people we would submit that any step which results in a child in any legal process being unable to have a solicitor or only being able to be represented by an advocacy worker to be restricting or reducing the access to the tribunal in such a manner that the very essence of the right to a fair hearing is impaired. An advocacy worker no matter how skilled and experienced and trained is an unqualified, unaccountable, unregulated lay person – and this is not a fair or acceptable alternative to being represented by a solicitor in any legal process where a child's rights must be safeguarded and enforced.

## **Advice Services for Children and Young People**

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58. The Scottish Legal Aid Board manages three grant funded programmes to 102<sup>19</sup> different projects across Scotland predominantly giving access help and advice, although not legal advice and assistance, for people affected by repossession, eviction, debt problems and benefits disputes. Around 18% of service users are represented in courts and tribunals by unqualified advice workers or “lay representatives”. These services can be a valuable alternative model of resolving legal problems for some adults and we have considered whether there might be similar alternative model which could expand access to resolving legal problems for children and young people, while working in a child and young person centred way.

59. Amnesty's report <sup>20</sup> states that because there are barriers to advice seeking for children and young people, as well as barriers to them representing themselves, in order to ensure this group receives the advice and representation they need child and person centred advice services to be available.

60. The Baring Foundation has asserted that independence for advice organisations “is what gives people the confidence and trust to seek the support they need.”<sup>21</sup> Young people may be more likely to find themselves in dispute or disagreement with their local authority and some kind of dispute with a local authority categorises the majority of legal issues encountered by children in the hearing system, looked after young people, care leavers, young parents and young people with issues around education or housing. The same research notes that lack of resources or conflicts of interest for statutory services or services funded by local authorities restrict the depth and scope of the advice they are able to provide appropriately. Advice services have to be independent and able to fully advise and assist the young person to pursue their statutory entitlement. Legal Aid funding could ensure advice services are independent of local authorities.

61. Research<sup>22</sup> tells us that children and young people do not access generalist adult advice agencies. There is evidence <sup>23</sup> that outcomes

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<sup>19</sup> Scottish Government Civil Justice Statistics in Scotland 2015-16 - 28 March 2017

<sup>20</sup> CUTS THAT HURT - The impact of legal aid cuts in England on access to justice – Amnesty International - October 2016

<sup>21</sup> Youth Access, “More of the same? The Advice needs of young people, January 2016; available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue)

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achieved for young people by mainstream adult advice agencies are not as good as those obtained by specialist advice services for young people, possibly because young people cannot engage with adult services as they require to in order to progress to a successful outcome. The young people we work with are usually unaware of generalist advice services or don't think that they are available to children (which they usually are not) or young people. When we refer or signpost clients to get help with benefits or debt they struggle to use adult services without support. We cannot expect children and young people to be supported and assisted in accessing advice by their families, carers or social workers as these supports are not autonomous and may not be appropriate.

62. The vast majority of young people indicate they would prefer to get legal advice in a youth setting from an adviser who specialises in working with young people. Young people strongly indicate<sup>24</sup> that they need one established trusted relationship with an advisor who can give them reliable specialist advice and help with multiple and overlapping legal issues all the way through to resolution. Restricting the courses of action that young people can take – because they have a generalist advisor and a number of complex and advanced legal issues to resolve – may prevent them from enforcing their rights and securing their entitlements. Young people tend to have many overlapping legal issues which cannot be resolved by a limited number of visits to a generalist advice agency. The data showed that case and personal outcomes improved as the depth of intervention increased from one-off advice to advocacy to representation.

63. The research and our experience in practice strongly suggests that generalist advice services may not be the most suitable or most effective for early resolution of children and young people's legal and rights based problems. The trusted relationship is so essential to the success of advice work with young people that the only model that will work is a young person having one dedicated, independent, expert advisor. Even if they have access to a dedicated advisor who works with them one to one in a child centred way, they also need someone

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<sup>23</sup> Youth Access, "More of the same? The Advice needs of young people, January 2016; available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue)

<sup>24</sup> Youth Access, "More of the same? The Advice needs of young people, January 2016; available at: [www.baringfoundation.org.uk/YouthAccessValue](http://www.baringfoundation.org.uk/YouthAccessValue)

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who can reliably help them with all their legal issues as they arise, and advocate on their behalf at any point in the legal processes affecting them, and does not need to give limited advice and help or pass them on through other services. Given that this is the model for successful engagement with young people, we would suggest that there may be no easy advice service alternative to the services of a child centred solicitor.

## **Child-Centred Advocacy to Assist Children To Give Their Views In Court Ordered Contact Cases**

64. Contact and parentage is the second largest category of civil legal aid accounting for 21% of all grants in 2015-16.<sup>25</sup> We are often asked to provide free advice and assistance to a child who is the subject of court ordered contact and who wants to put their views to the court. Legal skills and knowledge are not required to effectively resolve these cases and an experienced advocacy worker with a knowledge of children's rights and the relevant law can do this work with little risk or detriment to the child. In some cases it is necessary or beneficial for the child to have legal representation or become a party to the action and in those cases it is essential the child can access their own solicitor.

65. A Scottish Government study in 2010<sup>26</sup> found that there was a diverse range of well-regarded advocacy services providing support to children and young people across Scotland, meeting the needs of different groups and funded and resourced by national and local government, NHS boards and charitable trusts. However, there is not uniform coverage of advocacy services across Scotland and therefore inequalities in the provision of advocacy services. At that time there were no local or national strategic approaches to matching children and young people's needs with availability of service and the high levels of unmet demand. We do not see that the position is much changed or improved since and it remains very difficult to refer a child to an appropriate local advocacy service.

66. Young people have indicated that an advocacy worker who they can engage with from the outset of any case so they can give their views to the court and so that they know what is happening in the case and can

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<sup>25</sup> Scottish Government Civil Justice Statistics in Scotland 2015-16 - 28 March 2017

<sup>26</sup> 'Advocacy makes you feel brave': Advocacy support for children and young people in Scotland – Scottish Government 2010

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understand the decision would be helpful for them. <sup>27</sup>West Lothian Council Domestic and Sexual Assault Team have a dedicated advocacy worker based at Livingston Sheriff Court who is available to assist children and young people to give their views to the court in court ordered contact cases. In our view there would be significant benefits to extending such a service so that it is available in all courts in Scotland and to all young people called to give a view in a court ordered contact or residence dispute, subject to the advocacy worker directing and assisting the child to get a solicitor at the earliest point at which it is identified legal representation is necessary. It must be ensured that the advocacy worker is the child's own independent advocacy worker who can give the child's view independent of other family members or connections to the local authority.

67. The quality and capability of advocacy work can be inconsistent. Services have various levels of knowledge and experience. Many services are excellent but unfortunately we still come across cases where failure to identify that legal advice and representation was required has had a detrimental impact on the child's chances of successfully resolving the matter, or an opportunity has been missed to undertake a legal intervention that would have resolved the problem and secured the child's position and enforced their rights. In such cases the young person has no recourse against the advocacy or advice service as they would from a solicitor. To our knowledge, advocacy workers and services have no register or regulatory body. Expanding access to court-based advocacy workers as an alternative to solicitors in court ordered contact cases would require Scotland wide regulation of advocacy services.

### **A Possible Model For Supported Child And Young Person Centred Advocacy**

68. We lead a partnership project with an organisation which undertakes outreach and crisis work with homeless young people. This project has allowed us to pilot a model we call 'supported advocacy'. The model is: a specialist solicitor supports a small number of experienced advocacy workers to use the law and guidance to advocate on behalf of the young person to secure vital accommodation and services. The cases are escalated to a solicitor where necessary to protect their position and safeguard their rights.

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<sup>27</sup> Power Up Power Down "what do children Experiencing domestic Abuse say about being listened to" consultation  
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69. The success of this model is based on paid advocacy workers with a good level of relevant experience in advocating on behalf of young people as well as engaging with them. The advocacy workers have a clear understanding of the referral relationship and consistently consult and refer. They are continuously trained by a practicing specialist solicitor in small practice-issue focused workshops on using the law to advocate for young people's statutory rights. We can provide them with tailor made guides and tool kits to assist with advocating on behalf of young people.
70. Early interventions are more successful because the advocacy is backed by the weight of a potential legal challenge if the problem is not resolved in negotiation. We also minimise the risk of failure to identify legal remedy and protect challenges because advocacy workers can consult with the solicitor in detail, early and often.
71. There are often times with this group where a young person's life is too chaotic to let them engage with a legal service, or where they engage in an emergency, out of hours or in crisis, needing immediate intervention. Advocacy workers have a trusted relationship with the client which means they can keep and put clients in contact with all relevant agencies, including in crisis and emergency and out of office hours, and they ensure that the client is able to take the necessary steps to progress the matter as well as advocating on and assisting with non-legal matters, and providing holistic support.
72. This is a time and cost intensive but effective model allowing extremely vulnerable young people the level of holistic support they need to access and engage with legal services so they can enforce their rights and secure their statutory entitlements. We consider that this is a model that could be employed in other areas where young people are entitled to statutory support to expand young people's access to alternative models of resolving legal problems. It should be noted however that this model is contingent on funded solicitors working with advocacy services and would not be effective with unqualified workers only, as an alternative to or substitute for qualified solicitors and funded legal services.

### **What would a Child Centred system of Alternative Methods of Resolving Legal Problems for Children and Young People look like?**

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73. A child centred system including alternative methods of resolving legal problems for children and young people would be based on the principles: first that children are best served by having their own independent lawyer and legal advice where there is any need to protect their position, safeguard their rights and guarantee their entitlements; and second that we can build capacity in the third sector and increase access to justice to facilitate early intervention and resolution of legal issues for children and young people, by investing in dedicated child centred advocacy, support and advice services supported by second tier advice from legally aided legal services. Any alternative methods of resolving legal problems for children and young people would have the following characteristics

- a) Law centres and other legal aid solicitors should be able to access funding from the legal aid board for work such as 'second tier advice' to advocacy and advice workers which builds capacity in advice and advocacy services and expands access to alternative methods of resolving legal problems for children and young people.
- b) All children who are the subject of court-ordered contact cases could access a dedicated, regulated advocacy service to get assistance with putting their views to the court.
- c) Children and young people should not be reliant on using adult advice services which are not accessible or useable given children's specific advice seeking needs.
- d) All children and young people who need intensive and holistic support with resolving a variety of legal and non- legal issues have access to a dedicated, regulated child-centred advocacy service supported by second tier advice from legally aided legal services. They can be referred and directed to those services by all agencies supporting them.
- e) The child-centred advocacy service and child-centred advice services are always directly linked to - and work cooperatively and consistently with - dedicated, legally aided, child-centred specialist legal services who provide them with "second tier "advice and triage type assessment of legal issues in their cases, as well as specialist guidance on rights and the law to strengthen their advocacy and facilitate early intervention.
- f) The advocacy and advice services consult solicitors as standard in all cases with legal or rights aspects and ensure that the child's case is

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passed to a solicitor when that is what is required to protect their position and safeguard their rights.

- g) "Second tier advice" is legally aided and providers and users registered and regulated which provides quality assurance for the advice, and guarantees the second-tier advice services are child-centred.
- h) There are certain circumstances where there is no substitute for a child having an independent specialist solicitor. In those circumstances, all children and young people who need their own lawyer have access to dedicated and registered child-centred legal services and can be referred and directed to those services by all agencies supporting them.

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